S. Hrg. 98–1158

REGULATION OF COAL MINING ON INDIAN RESERVATION LANDS

HEARING

BEFORE THE

SELECT COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE

NINETY-EIGHTH CONGRESS

SECOND SESSION

ON

S. 2879

TO PROVIDE FOR COOPERATION BETWEEN THE SECRETARY OF THE INTERIOR AND INDIAN TRIBES WITH RESPECT TO THE REGULATION OF COAL MINING OPERATIONS ON INDIAN RESERVATION LANDS AND THE ACQUISITION AND RECLAMATION OF ABANDONED MINES ON SUCH LAND, AND FOR OTHER PURPOSES

AUGUST 10, 1984
WASHINGTON, DC

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PAUL ALEXANDER, *Staff Director*

CONTENTS

Page

S. 2879 4

Witnesses

Ami, Donald, director, Office of Natural Resources, Hopi Tribe 115
Eberhardt, Eric, assistant attorney general, Navajo Tribe 111
Farrand, Christopher, vice president of government relations, Peabody Coal Co 30
  Prepared statement 36
Fredricks, Thomas, attorney for the Crow Tribe 104
  Prepared statement 106
Goldwater, Barry, a U.S. Senator from the State of Arizona 21
Grandis, Edward, director, Citizens Mining Project, Environmental Policy Institute 45
Knows Gun, Ellis, Crow Office of Reclamation, Abandoned Mine Land Program, Crow Agency, MT 48
Melcher, John, a U.S. Senator from the State of Montana, prepared statement 2
Oglander, Joe, Office of the Solicitor, Department of the Interior 21
Power, Leona, Deputy Assistant Secretary for Land Minerals, Department of the Interior 21
Redhorse, David, director, Navajo Energy Development Authority 111
Schmidt, William, Assistant Director for Program Operations, Office of Surface Mining—Reclamation and Enforcement, Department of the Interior 21
Sidney, Ivan, chairman, Hopi Tribal Council 115
  Prepared statement 177

Material Submitted for the Record

Attachments to Crow Tribe testimony submitted by Ellis Knows Gun, Crow Office of Reclamation 52
Comments of the Hopi Tribe on S. 2879, submitted by Ivan L. Sidney, chairman and chief executive officer 177

APPENDIX

Additional Material Received for the Record

Letter dated August 31, 1984, from George J. Miller, attorney, Dechert Price & Rhoads, representing Westmoreland Resources, Inc., with enclosed document "Land Ownership and Surface Mining Regulation in the Crow Ceded Area" 147
Prepared testimony of Dennis Hemmer, commissioner, Montana Department of State Lands 154
Letter dated May 23, 1983, from Robert W. Long, vice president, American Mining Congress and William E. Hynan, senior vice president, National Coal Association, with enclosure; to James R. Harris, Director, Office of Surface Mining, Department of the Interior 164
Letter dated January 31, 1984, from William E. Hynan, senior vice president, National Coal Association and Robert W. Long, vice president, American Mining Congress, to James R. Harris, Director, Office of Surface Mining, Department of the Interior 170
Prepared Statement by the National Coal Association and the American Mining Congress Joint Committee on Surface Mining Regulations 189

Page
Letter dated September 5, 1984, from William E. Hynan, senior vice president, National Coal Association and Robert W. Long, vice president, American Mining Congress, to Senator Andrews 196
Prepared statement by the National Coal Association and the American Mining Congress Joint Committee on Surface Mining Regulations 198
Letter dated September 27, 1984, from William E. Hynan, senior vice president, National Coal Association and Robert W. Long, vice president, American Mining Congress, to Senator Andrews 227
Prepared statement of Judy Knight, vice chairman, Ute Mountain Ute Tribe of Colorado 232
Letter dated September 17, 1984, from Henry J. Sockbeson, attorney, representing the Native American Rights Fund, to Senator Andrews 242
Letter dated August 27, 1984, from Jack L. Mahaffey, president, Shell Mining Co., to Senator Andrews 246
Prepared statement of Alyce Spotted Bear, chairperson, the Three Affiliated Tribes of the Fort Berthold Indian Reservation 259
Letter dated September 10, 1984, from Chris Farrand, Peabody Holding Co., Inc.; Eric Eberhard, the Navajo Nation; Henry Sockbeson, Native American Rights Fund; William Hynan, National Coal Association; and Robert W. Long, American Mining Congress, with suggested amendments, to Senator Andrews 265

REGULATION OF COAL MINING ON INDIAN RESERVATION LANDS

AUGUST 10, 1984

U.S. Senate,
Select Committee on Indian Affairs,
Washington, DC.

The committee met, pursuant to notice, at 9:40 a.m., in room 562, Dirksen Senate Office Building, Hon. John Melcher (acting chairman of the committee) presiding.

Present: Senators Melcher and Goldwater.

Staff present: Paul Alexander, staff director; Max Richtman, minority staff director; June Tracy, legislative assistant; and Christine Drayton, secretary.

Senator **Melcher**. The hearing will come to order.

This morning we are to consider the proposal of the strip mining regulations for coal production on Indian reservations. It has been a long time coming. The 1977 act did not deal with Indian lands at all but directed that the Department of the the Interior conduct a study and make recommendations to Congress on how a strip mining law should apply to Indian lands.

It has been quite some time since 1977 and the Department of the Interior did not come up with the results of their study and their recommendations until 6 or 8 months ago. We found it to be unworkable and not meeting the needs of the tribes nor satisfying the mechanism of how to fit strip mining control—within a tribe or on an Indian reservation—into the overall mold of the basic act.

This bill, about which this hearing is being held, was recently introduced. It does meet that pattern and mold in a very good way. The tribes are treated like a State, as much as possible. The tribes have sought that. On the very basic issue of whether or not an Indian tribe should be able to regulate strip mining within the boundaries of their reservation in a manner that they so choose, as long as they meet the basic requirements of the act, is what we directed the Department of the Interior to study and to advise on in the 1977 act. This bill does that.

Now, there is a basic exception in how much of the program, and how the tribe fits into running the program, that is very different from the State. If the State is going to run the program, they take it over. They meet all the requirements and they run the program. As long as they meet the requirements, the Secretary of the Interior, after he agrees that their program is adequate and sufficient to meet the law, is out of it except to monitor it.

In this bill, we do allow a different type of mechanism. There can be a partial control and operation of the strip mine reclamation program by the Indian tribe. I think there is a valid reason for allowing that, in fact, for very staunchly backing it. States had had, in almost all instances, their own law on strip mining prior to the passage of the National Act. So, they already had a mechanism. They already had inspectors. They already had a legal process for whatever control they were exercising over strip mine reclamation, over the entire program.

We do not find that with many tribes. The only tribe that has had some experience with coal strip mining is the Navajo Tribe. I understand that the Navajo Tribe, on this particular feature of the bill, is supportive of it. I think it will be wise for Congress to allow this to other tribes.

Might I use an example: the Crow Tribe in Montana is not strip mining coal at present. They may do so in the near future. If that occurs, they are starting from scratch. They do not have control of reclamation and they do not have any inspectors. So, I think this option, and it indeed is an option, that we allow in this bill for a partial control and inspection by the tribe, to be supplemented by the Department of the Interior, is a pretty good option.

Second, we give the Indian tribes on their own reservation, as much as possible, the same authority as the State. We have also dealt with the question of dividing up the 35 cents per ton of subbituminous coal, that is, coal that is not real low grade. That is how much is produced in revenue, call it a tax, fee, whatever you want to call it; that is, a split between the State and the Department of the Interior. We treat the tribes exactly the same. The 35 cents per ton is split between the tribe and the Department of the Interior. I find that to be consistent and fair.

There is another point in the bill, and this is a point with which some of the tribes, perhaps, will not agree. Some of the companies might envision that their operation may take them onto reservations. In the case of the Navajos, there are companies already operating on their reservation and mining Indian coal. The question is, in the case of infractions of the regulations, what is the first court? We have opted for that first court to be the tribal court. We have also opted in the bill that any appeal from a decision made by that tribal court will go to a Federal court and will go de novo.

That is not appreciated by some of the tribes, perhaps a great many of them, but I think it is about the fairest way we can do it. In my judgment, if we are going to allow the tribal court to be the court of first instance, the appeal process going de novo into Federal court is not a bad balance.

Those are the only comments I have on the bill for the present.

[The prepared statement follows:]

PREPARED STATEMENT OF JOHN MELCHER, A U.S. SENATOR FROM THE STATE OF MONTANA

This morning, the Select Committee on Indian Affairs will receive testimony on S. 2879, the Indian Coal Mining Regulatory Act of 1984. Senator DeConcini joined me in introducing this bill on July 27, with the hope that it would provide a constructive opportunity for Indian tribes to effectively implement regulatory programs for the reclamation of their lands. Senator Goldwater was added as a co-sponsor to the bill on August 1. The bill provides for cooperation between the Secretary of the Interior and Indian tribes with respect to the regulation of coal mining operations on Indian reservation lands and the acquisition and reclamation of abandoned mines on such land.

The Surface Mining Control and Reclamation Act of 1977, called for a special jurisdictional study by the Secretary of the Interior, in consultation with Indian tribes. The provision also required the Secretary to propose legislation "designed to allow Indian tribes to elect to assume full regulatory authority over the administration and enforcement of regulations of surface mining of coal on Indian lands." This requirement in section 710 of the act was completed over a year ago.

S. 2879 is intended to provide for Indian regulation of surface coal mining operations and activities on Indian lands. As much as possible this bill is intended to place Indian tribes that have or will have coal strip mine operations on their own land in the same position as the States, with respect to reclamation programs. If the tribes do not elect to operate an approved reclamation program, then the Secretary of the Interior will be in charge of the program as required in the 1977 Surface Mining Control and Reclamation Act.

Today we will hear from the Department of the Interior, several tribes with extensive coal reserves, a representative of the coal mining industry and an environmental interest group.

The committee is well aware that each of these interested parties approaches this bill with a unique prospective. It is our hope that through the hearing process the committee can fashion a bill which is acceptable to each of these groups.

Senator MELCHER. Before we proceed, without objection, I will place a copy of S. 2879 in the hearing record.

[The bill follows. Testimony resumes on p. 21.]

II

98TH CONGRESS
2D SESSION

S. 2879

To provide for cooperation between the Secretary of the Interior and Indian tribes with respect to the regulation of coal mining operations on Indian reservation lands and the acquisition and reclamation of abandoned mines on such land, and for other purposes.

IN THE SENATE OF THE UNITED STATES

JULY 27 (legislative day, JULY 23), 1984

Mr. MELCHER (for himself and Mr. DECONCINI) introduced the following bill; which was read twice and referred to the Select Committee on Indian Affairs

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A BILL

To provide for cooperation between the Secretary of the Interior and Indian tribes with respect to the regulation of coal mining operations on Indian reservation lands and the acquisition and reclamation of abandoned mines on such land, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Indian Coal Mining Regulatory Act of 1984".

SEC. 2. The Congress finds and declares that—

(1) there exists between the Government of the United States and Indian tribes a special and unique trust relationship;

(2) as part of that trust relationship, congressional policy favors tribal self-determination which recognizes the special cultural values and identities of Indian tribes;

(3) Indian tribes own and control an estimated 15 per centum of the country's coal resources which may be recovered by surface mining, including nearly one-third of the low-sulfur strippable coal of the Western United States;

(4) surface mining operations on Indian lands result in disturbances of surface lands that may temporarily adversely impact the commerce, public welfare, and environment of Indian reservations;

(5) the governmental responsibility for regulating surface mining and its effects on Indian reservations should rest with the Indian tribes at their election; and

(6) because the jurisdictional status of Indian lands is unique, it is necessary to provide for surface mining regulation thereon by legislation separate from that enacted to apply to other lands throughout the United States.

DEFINITIONS

SEC. 3. For the purposes of this Act—

(1) The term "Indian lands" means all lands, including mineral interests within the exterior boundaries of any Federal Indian reservation, notwithstanding the issuance of any patent, and including rights-of-way, and all lands including mineral interests held in trust for or supervised by an Indian tribe.

(2) The term "tribal regulatory program" means a full or partial program established by an Indian tribe to regulate surface coal mining and reclamation operations on Indian reservation lands in accordance with the requirements of this Act and regulations promulgated pursuant thereto.

(3) The term "Federal Indian lands program" means a program for Federal regulation of surface coal mining and reclamation operations on Indian reservation lands in accordance with this Act in the absence of, or in conjunction with, a full or partial tribal regulatory program.

(4) The term "tribal regulatory authority" means the department or agency in an Indian tribe that has primary responsibility at the tribal level for administering this Act.

(5) The term "Secretary" means the Secretary of the Interior.

APPLICATION OF PROVISIONS TO INDIAN LANDS

SEC. 4. (a) Indian lands outside the exterior boundaries of any Federal Indian reservation shall be subject to the provisions of title IV and title V of the Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. 1231–1279) that apply to non-Federal lands.

(b) Indian lands within the exterior boundaries of any Federal Indian reservation shall be subject to the provisions of this Act.

TRIBAL ABANDONED MINE RECLAMATION FUND

SEC. 5. (a)(1) There is hereby created within the Treasury of the United States a trust fund to be known as the Tribal Abandoned Mine Reclamation Fund (hereinafter referred to as the "Tribal Fund") which shall be administered by the Secretary of the Interior. The Tribal Fund shall be administered separately from, and without regard to, the Abandoned Mine Reclamation Fund created under the Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. 1231).

(2) The Tribal Fund shall consist of—

(A) Fifty per centum of amounts deposited pursuant to section 401(b) of the Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. 1231(b)) which were generated by mining activities within the exterior boundaries of Indian reservations prior to the date of enactment of this Act; and

(B) Fifty per centum of funds hereinafter collected from mining activity on such lands pursuant to section 401(b) of such Act.

(3) The balance of funds referred to in paragraph (2) may be expended in any State or to any Indian tribe at the discretion of the Secretary in order to meet the purposes of this Act and title IV of the Surface Mining Control and Reclamation Act of 1977. Such funds may be expended directly by the Secretary or by making additional grants to approved State reclamation programs pursuant to section 405 of the Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. 1235) or to approved tribal regulatory programs pursuant to section 5 of this Act when the Secretary finds that such programs are the best means of accomplishing the specific reclamation projects. The Secretary shall consult and coordinate with the respective States or tribes those projects funded directly or in conjunction with other Federal agencies.

(b) The Secretary of the Interior shall invest, on a quarterly basis, all receipts accruing to the Tribal Fund. Such investments shall be in public debt securities with maturities suitable for the needs of the Tribal Fund and bearing interest at rates determined by the Secretary of the Treasury, taking into consideration current market yields on outstanding marketable obligations of the United States of comparable maturities. The income on such investments shall be credited to, and form a part of, the Tribal Fund.

(c)(1) All funds in the Tribal Fund shall be expended on Indian lands to meet the purposes of this Act.

(2) Eighty-five per centum of the funds deposited in the Tribal Fund annually shall be allocated by the Secretary to the Indian tribe having the ownership interest.

(3) In the event of multiple tribal ownership interests in the coal, the funds shall be allocated to the Indian tribes under paragraph (2) of this subsection in direct proportion to their ownership interests.

(4) The balance of the funds collected on an annual basis shall be expended, upon appropriation, on Indian lands, including those Indian lands from which no funds have been derived but which have been adversely affected by past mining and should be reclaimed to meet the purposes of this Act. Such funds may be expended directly by the Secretary or by making grants to approved tribal reclamation programs pursuant to section 3 of this Act. The Secretary shall consult and coordinate with the respective Indian tribes regarding those projects funded directly or in conjunction with other Federal agencies.

(d) Notwithstanding paragraphs (2) and (4) of subsection (c) of this section, all funds identified in subsection (a)(2)(A) of this section, and through the end of the reporting quarter which includes the date of enactment of this Act, shall be allocated to those Indian tribes from whose lands such funds were derived.

(e) Indian tribes, pursuant to an approved tribal abandoned mine reclamation plan, or the Secretary in the absence of an approved plan and in consultation and coordination with the Indian tribe, may expend funds appropriated from the Tribal Fund based upon the needs and priorities established by the Indian tribes. Funds may be exposed for—

(1) the purposes set out in sections 403 and 409, and subsection (g) of section 402 of the Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. 1233; 1234; 1232(g)); and

(2) the development and maintenance of scientific, administrative, judicial, or technical capabilities;

(3) provision of facilities for training and research; and

(4) other activities necessary for the development and implementation of tribal programs under this Act.

The Secretary shall assure sufficient funds are made available annually to carry out the purposes described in paragraphs (2) and (3).

TRIBAL REGULATORY PROGRAMS

SEC. 6. (a)(1) If surface coal mining operations are or may be conducted within the exterior boundaries of the reservation of any Indian tribe, such Indian tribe may submit to the Secretary a tribal regulatory program.

(2) An Indian tribe may, at its discretion, adopt a partial, phased program for the regulation of surface mining, to be implemented over such period of time as may be necessary for the development of expertise in the technical, scientific, administrative, and judicial aspects of the program. The decision whether to pursue full or partial regulatory authority, and the time required for development of full regulatory authority, shall rest solely with the Indian tribe.

(3) Secretarial approval of a tribal program may include phasing, as provided in paragraph (2) above, and an expected sequence of actions over time in order to assure the full realization of the objectives of the tribal program.

(b) the Secretary is authorized to approve a tribal abandoned mine reclamation program prior to the Indian tribe's adoption of a full or partial tribal regulatory program as provided by this Act.

(c)(1) The Secretary shall approve or disapprove a tribal regulatory program in whole or in part, within six calendar months after the date such program is submitted to the Secretary.

(2) If the Secretary disapproves any tribal regulatory program, in whole or in part, he shall notify the Indian tribe in writing of this decision and set forth in detail the reasons for the denial. The Indian tribe may resubmit a revised tribal program, or portion thereof, within ninety days from the date of receipt of the Secretary's decision.

(3) The Secretary shall approve or disapprove the resubmitted tribal regulatory program or portion thereof within ninety days after the date of resubmission.

(d) With respect to the application of sections 501(a) and 502 of the Surface Mining Control and Reclamation Act (30 U.S.C. 1251(a); 1252), the actions taken by the Secretary pursuant to subsections (c) and (d) of section 710 of such Act (30 U.S.C. 1300(c)–(d)) shall remain in effect until the day after the day of approval of a full or partial tribal program, or a Federal Indian lands program.

(e) Within six months after the date of enactment of this Act, the Secretary shall prescribe and publish in the Federal Register regulations concerning tribal regulatory programs consistent with and in accordance with the Surface Mining Control and Reclamation Act of 1977 and the provisions of this Act. Such regulations shall also include those standards and procedures necessary for the formulation, implementation, and assumption of administrative and judicial responsibilities, including the secretarial approval therefor, pursuant to this Act.

FEDERAL INDIAN LANDS PROGRAMS

SEC. 7. (a) As soon as practically feasible, but not later than eighteen months following the date of enactment of this Act, the Secretary shall implement a Federal Indian lands program for those aspects of titles V and VII of the Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. 1201–1328) which have not been assumed by an Indian tribe under an approved tribal regulatory program as provided for in this Act. Such Federal Indian lands program shall, at a minimum, be consistent with and in accordance with an approved State or Federal permanent lands program for the State in which the Indian lands are located.

(b) In order to complement the approval of a phased tribal program, the enforcement of a Federal Indian lands program shall be conducted in accordance with sections 504 and 521 of the Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. 1254; 1271).

(c)(1) Any Indian tribe may elect to enter into a cooperative agreement with the Secretary to provide for tribal participation in the regulation of surface coal mining and reclamation operations on Indian lands under a Federal lands program implemented by the Secretary under subsection (a).

(2) In any case where a mining operation extends beyond the exterior boundary of an Indian reservation, an Indian tribe may enter into a cooperative agreement with the State or States in which the operation is also located to provide for tribal participation in the regulation of surface coal mining and reclamation operations. Such agreement must adopt the most stringent environmental protection standards of the State, or States, or Indian tribe that is party to such agreement, regardless of the regulatory entity.

(3) Assumption of regulatory responsibilities under a cooperative agreement may be part of the implementation of a tribal regulatory program.

(d) In the absence of any tribal regulatory program, the Federal Government pursuant to section 504 of the Surface Mining Control and Reclamation Act of 1977 shall be the exclusive authority regulating surface coal mining and reclamation operations on the Indian reservation.

SURFACE OWNERS

SEC. 8. (a) Notwithstanding subsection (f) of section 714 of the Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. 1304), the provisions of subsections (c), (e), and (g) of such section shall apply to all coal owned by and all coal held in trust by the United States for an Indian or an Indian tribe under land the surface rights to which are owned by a surface owner as defined in subsection (e) of section 714 where the coal is to be mined by methods other than underground mining techniques.

(b) The provisions of subsections (c), (e), and (g) of section 714 of the Surface Mining Control and Reclamation Act of 1977 shall apply to all persons, including Indians and Indian tribes, that meet the surface owner requirements of paragraphs (1), (2), and (3) of subsection (e) of such section.

PENALTIES

SEC. 9. (a) Notwithstanding the penalty provisions of Public Law 90–284 (25 U.S.C. 1301, et seq.), popularly known as the Indian Civil Rights Act, the civil penalty provisions of any tribal program shall incorporate penalties no less stringent than those set forth in section 518 of the Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. 1268) and shall contain the same or similar procedural requirements thereof.

(b) Tribal courts or any other tribal authority designated in an approved tribal program shall have original jurisdiction to impose civil penalties and sanctions under this Act on all persons who violate this Act (including members of the Indian tribe and individuals who are not members of the Indian tribe) who are engaged in surface coal mining and reclamation operations on Indian lands.

(c) Civil penalties imposed under this Act may be recovered in a civil action brought by the tribal regulatory authority in tribal court.

(d) Any final tribal court judgment rendered under the provisions of this Act shall be appealable to a district court of the United States. Review of tribal court judgments shall be de novo and subject to the standards set forth in section 706(2) of title 5, United States Code.

(e)(1) Nothing in this Act shall be construed to eliminate any additional enforcement rights or procedures which are available under tribal or Federal law to a tribal regulatory authority but are not specifically enumerated herein.

(2) Nothing in this Act shall be construed as granting tribal courts criminal jurisdiction over any person who is not an Indian.

ACTIONS BY PRIVATE CITIZENS

SEC. 10. (a) Any person having an interest which is or may be adversely affected may commence a civil action, as provided in section 520 of the Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. 1270) on his own behalf against the Secretary in order to compel compliance with this Act if such person alleges in such action that the tribal regulatory authority has failed to perform any act or duty under this Act which is not discretionary with the tribal regulatory authority and for which the Secretary bears oversight responsibility. The tribal regulatory authority may intervene as a matter of right in such actions. If the action is resolved in favor of the complainant, the Secretary shall take affirmative action to assure compliance by the tribal regulatory authority, including the application of whatever sanctions he may deem appropriate or necessary.

(b) In addition to the action provided in subsection (a), any person having an interest which is or may be adversely affected may commence a civil action on his own behalf to compel compliance with this Act and damages under the procedures provided in section 520 of the Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. 1270).

(c) For purposes of this section, the term "person" includes any Indian tribe.

GRANTS

Sec. 11. The Secretary is authorized to make grants to any Indian tribe for the purpose of assisting such tribe in developing, administering, and enforcing tribal programs under this Act, including the development, maintenance, and administration of tribal court activities that are necessary to carry out the purposes of this Act.

LAND ACQUISITIONS

Sec. 12. Any land acquired—

(1) by the Secretary on behalf of any Indian tribe, or

(2) by any Indian tribe,

under the provisions of this Act shall be held in trust by the Secretary for the benefit of such tribe.

CONFLICT OF INTERESTS

SEC. 13. (a) Except as provided in subsection (b), any financial interest of a person in any underground or surface coal mining operation which exists solely by reason of such person's membership in an Indian tribe shall not be treated as creating a conflict of interest that precludes appointment of such person to, or employment of such person with, any tribal regulatory authority having responsibilities under this Act.

(b) No person having a direct financial interest in a coal operation, or employed by an Indian tribe in a coal operation in which the tribe has a direct profit interest may serve in any capacity within a tribal regulatory authority.

ARCHAEOLOGICAL, HISTORICAL, AND CULTURAL RESOURCE INVESTIGATIONS

SEC. 14. (a) All mining permit applications submitted either under a tribal regulatory program or under the Federal Indian lands program shall be subject to an archaeological, historical and cultural resources investigation of the proposed mining area. Such investigation shall be complete and shall be evaluated by the tribe prior to any further consideration of the mining permit application.

(b) All information resulting from such investigation shall be the sole and exclusive property of the tribe and shall remain confidential except as provided in subsection (c) of this section.

(c) All information resulting from the archaeological, historical and cultural resource investigation on lands subject to such permit application to mine, shall be made part of the permit application only when such permit application is deemed complete by the tribe.

APPLICATION WITH THE SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977

SEC. 15. For all purposes not inconsistent with this Act, Indian tribes shall be considered as "States" for purposes of meeting the provisions of the Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. 1201–1328) and its provisions are hereby applicable to tribal regulatory programs and Federal Indian lands programs.

REGULATIONS

SEC. 16. (a) The Secretary shall prescribe such regulations as may be necessary to carry out the provisions of this Act.

(b) The regulations prescribed by the Secretary under this Act shall be consistent with and in accordance with the regulations prescribed under the Surface Mining Control and

Reclamation Act of 1977 to the extent that the provisions of this Act are similar to the provisions of such Act.

ANNUAL REPORT

SEC. 17. The Secretary shall submit an annual report to the President and to the Congress concerning—

(1) the effectiveness of this Act, and

(2) the activities carried out by the Secretary and the Indian tribes under this Act,

during the preceding twelve-month period. Such report shall include recommendations for legislative or administrative action which the Secretary considers to be necessary or desirable to accomplish the purposes of this Act.

AUTHORIZATION OF APPROPRIATIONS

SEC. 18. There is authorized to be appropriated to the Secretary of the Interior for the purposes of this Act, and from the Tribal Fund established pursuant to section 4 of this Act, such sums as may be necessary to carry out the purposes of this Act. All such funds appropriated shall remain available until expended.

SEVERABILITY

SEC. 19. If any provision of this Act, or the applicability of any provision of this Act to any person or circumstances, is held invalid, the remainder of this Act and the application of such provision to other persons or circumstances shall be not affected thereby.[1]

Senator **Melcher**. I now recognize the senior Senator from the State of Arizona, Senator Goldwater.

STATEMENT OF HON. BARRY GOLDWATER, A U.S. SENATOR FROM THE STATE OF ARIZONA

Senator **Goldwater**. I really do not have much to say about this. We have, as you mentioned, in the State of Arizona about one-third of all the coal reserves in the United States and that is, of course, counting shale and the bituminous, and so forth. The Navajos and the Hopis have a working program which they negotiated with the coal company. I will not say that it is completely satisfactory with all parties, but I am a firm believer that the reservation lands are the Indian's lands and the less the Federal Government has to do with their operations the better.

If they have courts and the courts can make determinations, I think we should recognize their courts. I look forward to hearing from the different tribes and seeing what they have to say about this. As I say, in Arizona we have a very gigantic program underway that I imagine last year shipped about 200 million tons of coal. If there is dissatisfaction on either side by either party, I think those things can be worked out.

So, I look forward to this hearing on the legislation.

Senator **Melcher**. Thank you very much.

Our first witness today is Leona Power, Deputy Assistant Secretary for Land and Minerals Management from the Department of the Interior.

Leona, I see you have listed William Schmidt and Joe Oglander; if you would like to have them at the table, you may. It would be helpful to us, too.

STATEMENT OF LEONA POWER, DEPUTY ASSISTANT SECRETARY FOR LAND AND MINERALS, DEPARTMENT OF THE INTERIOR, ACCOMPANIED BY WILLIAM SCHMIDT, ASSISTANT DIRECTOR FOR PROGRAM OPERATIONS, OFFICE OF SURFACE MINING—RECLAMATION AND ENFORCEMENT; AND JOE OGLANDER, ATTORNEY, OFFICE OF THE SOLICITOR

Ms. **Power**. Thank you, Mr. Chairman.

As you mentioned, I have with me Mr. Schmidt, the Assistant Director of Program Operations and Inspection with the Office of Surface Mining, and Joe Oglander with the Office of the Solicitor, Division of Surface Mining.

We have a fairly brief statement that I would like to read for the record, and then we will be willing to answer any questions that the committee might have.

We appreciate the opportunity to provide the committee with the administration's views on S. 2879, to provide for cooperation between the Secretary of the Interior and Indian tribes with respect to the regulation of coal mining operations on Indian reservation lands and the acquisition and reclamation of abandoned mines on such lands.

As you pointed out in your opening statement, the Surface Mining Control and Reclamation Act of 1977 directed the Secretary of the Interior to report to Congress outlining what legislation would be necessary to provide a framework whereby tribes could elect to assume full regulatory authority for surface mining operations.

Preparation of this report began in the previous administration, and Secretary Clark submitted the report to Congress on February 16 of this year. It details a number of issues that the Secretary believes are important for the Congress to consider when developing legislation for tribal regulatory authority. That report forms the basis of the comments I will be presenting today.

Mr. Chairman, I am sure the committee is familiar with that report, but I am not sure that OSM has had an opportunity to formally submit that report to this committee. Therefore, we have copies here to make available for the committee at your convenience.

Our primary concern is that whatever legislation Congress adopts dealing with the regulation of surface coal mining on Indian lands should provide consistent and equitable treatment for both tribes and States. SMCRA is an environmental law designed and enacted to protect the health, safety, and welfare of the American public and its future generations. To be successful, it must be administered fairly and diligently with equal treatment for all.

We certainly recognize that tribes have special needs, and the Department's obligations which arise from its trust responsibilities require special attention. However we believe that these special needs can be and must be satisfied without creating inequities.

A general concern we have with S. 2879 is that it is a mix of new legislation, amendments, and cross references to SMCRA. For example, section 5 presents a new concept in managing the tribal share of the abandoned mine reclamation fund. In doing so, it effectively amends SMCRA. Other sections of the bill incorporate other portions of SMCRA by cross reference, and still other sections have provisions that are similar to SMCRA. Finally, section 15 applies all of the provisions of SMCRA to tribal and Federal regulatory programs for all purposes not inconsistent with this act.

We are concerned that this approach will create unintended conflicts between the two acts and will result in needless confusion and controversy. This approach offers an unnecessary and unacceptable risk that the intent of Congress may be frustrated or obscured by unintentional inclusion or exclusion of cross reference provisions.

We would prefer an approach of amending SMCRA to accommodate Indian lands. We believe that all the needed and desired changes can be more effectively accomplished through this approach.

Alternatively, an entirely separate law which would spell out fully all the relevant provisions applicable to Indian tribes and comprising a comprehensive regulatory framework would be preferable to legislation mixing pieces of both new and existing provisions.

S. 2879 does not resolve what is almost certainly the most difficult and controversial underlying issue in the area of tribal regulatory programs, that being the definition of Indian lands. Section 3 of the bill is almost identical to the definition found in section 701 of SMCRA which has caused confusion and which led to OSM proposing six alternative definitions of Indian lands for congressional consideration. We had no basis for recommending one option over another.

While the legislation retains the existing definition of Indian lands, it does not maintain the existing boundaries of jurisdiction currently found in SMCRA. Section 4 authorizes tribes to regulate inside the boundaries of reservations, but outside the boundaries of reservations, lands are, "subject to the provisions of SMCRA that apply to non-Federal lands."

Indian lands are non-Federal lands, and SMCRA defines "lands within a State" as excluding "Indian lands." We believe that under S. 2879 off-reservation Indian lands would continue to be subject to the provision references in section 710 which requires a regulatory program to be implemented by OSM. The intent of this provision is not clear and we urge you to resolve the confusion by clarifying the definition of Indian lands.

In section 5 of S. 2879, we have major questions involving issues of equity with regard to the treatment of abandoned mine reclamation programs. This section establishes a new trust fund within the Treasury of the United States to be known as the Tribal Abandoned Mine Reclamation Fund. This fund is to be administered separately from the AML fund as established in SMCRA.

Other provisions of section 5 require the Secretary to invest tribal funds in interest bearing securities and allow approval of tribal AML programs and grants before the full assumption of primacy. In addition, S. 2879 allows new uses of the funds which are not related to the reclamation of abandoned mine lands.

None of these provisions are available to the States. The Department does not believe that such changes are needed to address the unique problems of the tribes. If these changes are desirable, they should be considered for both State and tribes. In any case, this is a subject which we recommend to be considered as a separate issue and should not be made a part of this legislation.

Section 8 of the proposed legislation makes the surface-owner consent provision of SMCRA found in section 714 applicable to Indian lands. We recommend that coal owned by Indian tribes should be treated like State-owned coal and private coal and not be subject to the restrictive provisions of section 714.

The Department recommends against the requirement in section 9(d) of S. 2879 that review of tribal court judgments in Federal district courts be conducted de novo. Prompt enforcement is effective enforcement and a de novo review introduces unnecessary delays in the process. Record reviews have proven satisfactory in Federal and State enforcement.

In addition, the committee should be aware of pending litigation which may be affected by this legislation. In *Crow Tribe* v. *Montana,* the Crow Tribe and the United States are challenging the application of Montana's severance and gross proceeds taxes on coal owned by the Crow Tribe which is being mined outside the exterior boundaries of the Crow Reservation. We suggest that a provision be added to clarify that the bill is not intended to affect, in any way, the power or authority of the tribe or the State to impose or collect taxes on coal owned by a tribe but located outside the exterior boundaries of a reservation.

Second, in the case of *State of Montana* v. *Clark,* Montana, the Crow Tribe, and the United States are contesting the distribution or allocation of funds already collected on the production of the Crow Tribe's coal mined outside the tribe's reservation boundaries.

Section 10 of S. 2879 provides for challenges against the Secretary where tribes have failed to act. As we recommended in our legislative proposal, we believe the tribes should be subject to challenge themselves.

In section 11 of S. 2879, another equity issue is raised with regard to the level of grants to be made available to the tribes for regulatory programs. S. 2879 authorizes grants to tribes to assist them in carrying out regulatory activities but does not specify a matching percentage. This could allow for Federal grants for 100 percent of the costs incurred by the tribe.

Section 705 of SMCRA limits grants to 80 percent of costs for the first year, 60 percent the second year, and 50 percent for the third and succeeding years. The Department recommends that the same grant levels be specified for tribal programs. There is ample opportunity for tribes to recover the remainder of their costs from fees.

In addition, there are several other questions that are raised by S. 2879 which the legislation does not address and the Department feels are critical to the complete treatment of the Indian lands question. In our report to the Congress, we ask the committee to address the issue of alluvial valley floors. The Secretary recommends that coal on Indian lands be treated like private coal. Therefore, the exchange program specified in section 150(d)(5) should be made applicable to Indian lands where coal is precluded from being mined through the denial of a permit. No exchange should be allowable if the exchange applicant has no intention of mining the coal.

The issue of lands unsuitable for mining is discussed in our report. The Secretary's recommendation is twofold: Indian lands should be treated like non-Federal and non-Indian lands within a State. The should be subject to general review and designated unsuitable, if appropriate, after a petition process similar to that applicable to the States. If minerals are owned by or held in trust for an Indian tribe but are not considered Indian lands for jurisdictional purposes, the tribe or tribal regulatory authority should be able to review and, if appropriate, withdraw such lands from coal leasing.

Similarly, if just the surface of off-reservation lands are held in trust for an Indian tribe and are not considered Indian lands, a tribe should be able to petition the regulatory authority for declaration of unsuitability.

S. 2879 does not address the issue of condemnation rights for the tribe. Our report recommended that for on-reservation lands, the tribes be treated as States in this regard as specified in section 405(i) but that for this provision to be applicable, individual tribes must adopt appropriate authority in their tribal constitutions, bylaws, resolutions, codes, or traditional methods and programs. Such authority would be more difficult off-reservation and would need further clarification depending upon the definition of Indian lands which is adopted.

We would be pleased, at this point, to discuss these and any other issues you and your staff might have and to assist the committee in any way in furthering the Indian lands legislation.

We would like to congratulate the committee on this legislation and taking steps to move this legislation forward. At this point, that concludes my statement. We will be glad to answer any questions.

Senator MELCHER. Let me refer to Secretary Clark, as is proper. He is known as Secretary, and I assume that perhaps you developed some interest in this subject. I do not know how long you have been working on this, Leona. I assume 4 or 5 years?

Ms. POWER. The Department, I believe, has.

Senator MELCHER. How long have any of you personally been working on it?

Ms. POWER. I have to say that I came into my position in January of this year.

Senator MELCHER. You are not responsible for that report, then, except in final policy note stages. How about the rest of you? How long have you been working on any phase of the coal strip mining act?

Mr. SCHMIDT. My name is William Schmidt. I am Assistant Director for Operations and Inspection for the Office of Surface Mining. My section of the organization has been working on this legislation for about 2½ years.

Mr. OGLANDER. The Division of Surface Mining has been working on the legislation also for 2½ years. I have been involved in it for a year.

Senator MELCHER. I think I have been looking at every point you raised, Leona, for the past 10 years. Before the final passage of that bill in 1977 Congress had looked at it for 3 or 4 years. It had been twice vetoed but that did not change much in the process to when it was finally passed. So, I do not think any of these points that you raised are anything new for any of us who have been connected with the process and have been thinking about what should or should not be in the power of the tribe and how that should dovetail with the act itself.

I had early thought that we ought to put it in the original act, but that did not happen, so perhaps now we are in a better position for passage at this time. We have gained a little more experience with the act itself. Perhaps we can do a better job of dovetailing the Indian lands in with the other act. But, of course, we want it to dovetail in. Why shouldn't there be reference to SMCRA—I hate that term but it is easy so I will use it, too—why should we dovetail it in with SMCRA? That is what we want. We do not view coal produced on an Indian reservation and used in the economy any different than coal produced by the State or private individuals or the Government or whatever. It all burns about the same. It has the same quality, the same Btu, and the same components. So, we want it to fit in.

That is why there are a lot of references. I, at least at this stage, am not at all willing to go with a new bill, a self-standing bill. I think that would be impossible and would not be for any good purpose anyway. I do not think it would benefit the tribes. I think the companies would be at a loss to know where they are, and certainly we had better believe, and I know this to be true and I hope you all agree, that if we had a free-standing deal with all new regulations, it is almost a certainty that Indian tribes, over the course of the next 6, 10, 15, maybe forever, number of years, would be at a disadvantage.

At the outset, they would be at a disadvantage because of the new regulations and how they vary from what the companies are used to. So that could be litigated or hamstrung waiting for the Secretary to adjust.

Ms. POWER. Mr. Chairman, we are certainly aware of the problems that would be raised by a free-standing bill, and that is why we would prefer the approach of amending SMCRA. There are a number of the titles of the bill where this can be done very easily by inserting the words, "and tribe" following references to the State. That is the focus of our report. It pointed out those provisions of existing law that would need to be changed, need to be amended in ways other than just adding the tribes under the jurisdiction of the legislation. It would make it much easier for us to administer the act if we had everything in one statute as opposed to having two acts that you have to jump back and forth between.

Senator MELCHER. I think that is possible, but I might point out, it is really extremely difficult and it would not avoid a great deal of litigation anyway, because if you are going to just make that reference, "and States," you can do it just as well by incorporating all of the titles and all of the sections of SMCRA that you want to apply, as we have done. If there is something wrong with that, we would be glad to look it over, but the opportunity for litigation can certainly fall very easily into the laps of willing lawyers, if when a section of SMCRA is designed in particular for a State and its sovereign authority, and then you just add Indian tribes onto that, it seems to me to be an open door to litigation in case of sovereign conflicts that are not recognized for the tribe but are recognized for the State.

Much of the authority, as I understand it, from acts of Congress, for the Secretary of the Interior in his trust responsibility cannot be ignored. We have a lot of case law on that, but I do not know how much case law we have on the sovereign authority of an Indian tribe. We want Indian tribes to have the opportunity to forgo the invitation to litigation. I think we better stick with what we know we can do or we are going to be a long time allowing that general authority.

Now, the definition of Indian lands in this bill is almost like the definition in the act. I believe it is identical. You mentioned, Leona, that the Office of Surface Mining has offered six different definitions. Do you want to tell us what the problems are with the Office of Surface Mining? We are sure open for discussion on that.

I do not know these six different definitions which they have recommended, but I do not think that is any hangup, as far as I know, because I have watched the Secretaries over the past 10 years, even assisted them in one case with legislation to trade out Indian-owned coal for Federal coal. They probably have within the Department about half a dozen proposals right now to do the same thing again. If Indian lands in terms of what the coal is—and that is all we are talking about here—has been a great problem, I do not know how you can trade it out. Do you know? Or do you even know what I am talking about?

Ms. POWER. Mr. Chairman, I am not sure I am following your question.

Senator MELCHER. The Department of the Interior has been trading Indian coal within an Indian reservation for a number of years. Now, if the definition has been unclear on what Indian lands are for all these years—because we are not talking about trading land or operating land except to extract coal from it in this bill—and it is Indian coal owned by the tribes that has been traded for Federal coal, and if that has not been a hangup, please tell me why the definition is a hangup now in SMCRA.

Ms. POWER. I think I will defer to Mr. Schmidt on that question.

Mr. SCHMIDT. We have had a number of disputes with the States on the exact interpretation of it.

Senator MELCHER. Within the reservation?

Mr. SCHMIDT. Yes, sir. There are certain questions that still are not answered by the definition and it has to do with the complex matter of law on Indian lands. One of the things our report points out is the existing definition, at least the one in SMCRA, talks to mineral interests held in trust for or supervised by an Indian tribe. The term, "supervised by an Indian tribe," according to the lawyers, is not a legal term of art. It is not a standard phrase, and there has been some dispute on what it means to be supervised by an Indian tribe.

One of the reasons, I think, that the Department did propose the six definitions is to help make the point that there are areas that are gray areas within the existing definition. Adopting one of these six, or an alternative chosen by the Congress, would help very much in administering the program and make clear just what responsibilities exist on what lands.

Senator MELCHER. Well, this is news to me, but that is beside the point. Let me just say this: In that particular matter, and in any other of these questions that we have raised where we do not have the proposals of how to correct them, let us sit down with you and get those proposals on paper, with words, and see where we are.

Ms. POWER. We will be glad to work with the committee to provide whatever language might be appropriate.

Senator MELCHER. I think what the bill intends—at least it is my intention and I think the bill says so—is on that coal outside of a reservation, and I will use the Sarpi Basin, the ceded strip coal of the Crows as an example, on that coal, we are saying the State regulates.

Ms. POWER. I believe that the act defines land within a State to exclude Indian lands. Therefore, if the Indian tribe does not have the authority to regulate that land, and the State is not given that authority, if that is the intent of the bill, then we feel that that point needs to be clarified.

Senator MELCHER. That is exactly what is happening with that Indian coal. The State is regulating that, and we want it to stay that way. That mine has been operating for, I think, 10 years.

Ms. POWER. At this point, though, under existing law, OSM also has some regulatory authority over that coal. So, our point on that question is that we need to clarify exactly the intent.

Senator **Melcher**. You know, I have heard that ever since we passed the bill, but before we passed the bill I never heard it. I am not blaming any of you three, believe me, but I had heard that the Indians regulate part of it. The only part I know of which they regulate is through a quirk, I think, in the original act, or a misinterpretation by the Secretary of the Interior, and they have gotten some of the reclamation funds.

Ms. **Power**. You may have misunderstood. I did not mean to say that the Indians were regulating that right now. OSM, in Federal oversight, in our role for regulatory authority under section 710, now has responsibility for regulation.

Senator **Melcher**. For regulating what?

Ms. **Power**. Off-reservation——

Senator **Melcher**. No; I am just talking about the Crow coal in Sarpi Basin, the Westmoreland Mine. What is OSM regulating?

Ms. **Power**. Mr. Schmidt.

Mr. **Schmidt**. OSM is the regulatory authority on that property.

Senator **Melcher**. Does the State just approve a plan?

Mr. **Schmidt**. Well, there has been a dispute, as I am sure the Crow representatives will testify. The State has disputed a number of aspects of the jurisdiction. In the most recent case, the ongoing case of collection of AML money; it has been the Department's position that, based on the definition of the act which is essentially the same as your definition, those lands are Indian lands and therefore not subject to apportionment or allocation by the States.

Senator **Melcher**. I hope this is only a technical problem, but we thought it was pretty straightforward language in section 4(a):

> Any lands outside the exterior boundaries of any Federal Indian reservation shall be subject to the provisions of Title 4 and Title 5 of the Surface Mining Control and Reclamation Act.

That applies to non-Federal lands.

Mr. **Schmidt**. I think the problem is that by adopting the definition of Indian lands from SMCRA and then saying that the regulatory provisions only apply to that area within the exterior boundaries of the Indian reservation, you have left up in the air the issue of the trust lands or lands where the Federal Government has some responsibility for the coal or for the land. Our interpretation right now would be that those lands are still Indian lands because that is the definition you have adopted.

Senator **Melcher**. Trust lands where?

Mr. **Schmidt**. Outside the boundaries of the reservation. You limit the tribe's authority to regulate to the exterior boundaries, but your definition is all inclusive. It is as broad as the SMCRA definition is currently which means, then, lands outside the exterior boundaries but included within the definition are regulated by the Office of Surface Mining as Indian lands.

Senator **Melcher**. I think that is a little bit more than technical, but I do not think it is insurmountable. I think I see the point.

Now, to clarify; are you for it or against it? I guess you are against it.

Ms. **Power**. Yes, sir.

Senator **Melcher**. Well, we will hear from the companies. They can speak for themselves.

Wishful thinking does not make a legitimate court—and I have a lot of wishful thinking—but that does not necessarily mean that you can have confidence in the tribal court. I am not impressed by the lawsuits that are springing up all over. I know they will be springing up forever. Regardless of the decisions that are being made, they will be reversed here and reversed there. When you have such a basic situation as the *Oliphant* case where an Indian police officer cannot even arrest someone who is beating him, we are getting down to pretty basic.

All we are striving to do is to set a pattern that if a tribe wants to go ahead with mining their own coal, they can do so in the best possible way that is practical and get a company to mine the coal. But there are some restraints here. The restraint is, is there a functioning tribal court and can you depend upon it?

Ms. POWER. Our position on de novo is based on our basic assumption that tribes should be treated like States. Under current law, States are given some deference by review on the record. Therefore, we think that the tribes should be treated the same as States.

Senator MELCHER. Could you give us a lot of money, and a lot of Indian attorneys, and a ~~lot of In~~dian judges, and forget about the 25 years it might take for some tribes to get in that position? You know, that is basically where we are. I hope that tribes can develop a court system so that they not only have confidence in themselves but other people have confidence in them. Believe me, I speak from a little bit of experience. There are a great number of tribes that have no confidence at all in their present tribal court.

Ms. POWER. And we believe that you have added that confidence factor back in your bill by providing for the appeal to Federal court. Obviously, Congress can adopt de novo appeal if that seems the most appropriate action. Just from our perspective, it is more workable to do appeals on the record.

Senator MELCHER. I guess the real test of this is, are companies comfortable with what their prospects are, as they now exist, for going ahead and making the investment with tribes on private coal? If they are, if they are confident of the tribal court, who am I to argue with them. But I think the de novo is there, just to make sure that if they are uncomfortable with how they might be treated in tribal court, they at least would have de novo. They may say otherwise, and I will listen to them.

Ms. POWER. You will have to ask them that, but by providing an appeal to Federal court, we feel that you have taken care of that problem.

Senator MELCHER. Well, that might be. We will see.

That is all the questions I have. Senator Goldwater?

Senator GOLDWATER. I have just a few.

Let me set up an example. There are about 73 million acres in my State. Fifteen different tribes occupy 19 different regions which make up roughly 20 million acres. Now, most of that Indian land has not been reached by treaty. I would just make a horseback guess that maybe 2,000 to 3,000 acres are treaty lands. The question is, is there, in your opinion, a difference between the treatment of Indians living on treaty lands and Indians living on designated lands? The Indians that live on treaty lands have pretty much full control over what they do and do not do. Unfortunately, the treaty lands I am addressing myself to do not fall where the coal reserves of our Indian land rest.

Mr. Chairman, I believe that we should have Federal legislation which recognizes the tribal regulatory authority over surface mining and reclamation activities of Indian tribes. My own personal feeling is that these matters should be left up to the tribe without any intervention of the Federal Government, but if it is necessary, and I have to say that I am speaking in a parochial way from my close association with my own tribes who seem very able to handle their own affairs; there may be tribes that are less able to handle their own affairs, tribes who do not have the well developed court system that many of our tribes do, but that feeling is based on an idea that I have always had, that the tribes possess the inherent sovereignty, whether it is treaty lands or Presidential designated lands, to regulate anything in the way of reclamation or mining.

I am all for this bill, but in my humble opinion, it does not really do much for my tribes which are engaged in coal mining and have already worked out—I won't say they are universally accepted deals by the coal companies, and I think they are in the process now of changing that—but that is their business. I just want you to understand that. I back this bill, and I think there are many, many tribes in this country that need it. I do not like to sound boastful, but my tribes have learned a long time ago to handle their own affairs. I do not want Uncle Sam sticking his long finger in there.

That is all I have.

Senator MELCHER. Thank you, Senator. And thank you all very much for going over these points one by one.

Ms. POWER. Thank you, Mr. Chairman. Again, we congratulate you for your efforts and, as you pointed out, on defintion problems or on jurisdictional problems, our concerns are probably not insurmountable and we will be glad to work with you.

Senator MELCHER. All right. Thank you very much.

Senator GOLDWATER. Did you get an answer on that treaty land business?

Ms. POWER. Thank you, Senator. Our understanding of S. 2879 is that there would be no difference between treaty lands and on other lands within the reservation. Under this bill the principal distinction seems to be between on-reservation and off-reservation lands.

Senator MELCHER. Our next witness is Christopher Farrand of Peabody Coal Co.

STATEMENT OF CHRISTOPHER FARRAND, VICE PRESIDENT OF GOVERNMENT RELATIONS, PEABODY COAL CO.

Mr. FARRAND. Thank you, Senator. My name is Christopher Farrand. I am vice president of Peabody Holding Co. which is the parent of Peabody Coal Co.

I want to say at the outset that we at Peabody favor enactment of a bill that settles the question of Indian regulatory authority over coal mining operations. We have been operating in a relative degree of limbo since the passage of SMCRA, and I think it behooves all of us to get on with this question. I want to applaud your efforts to address the issue and to come up with a rational solution.

Our goal, I think, is an effective regulatory mechanism which does not disadvantage those operations on Indian lands vis a vis coal mining operations on non-Indian lands. For the record, Peabody Coal Co. has two current operations involving Indian land. There are two mines on the Navajo and Hopi reservations in Arizona which together produce 12 million tons per year. The mines employ approximately 1,000 people, of which 87 percent are Native Americans. I have been told that we are the largest private employer of Indians in the country.

Peabody owns these mines under leases with the Navajo and Hopi Tribes. One lease was signed in 1964 involving lands on the Navajo reservation outside the former Navajo-Hopi Joint Use Area. The second lease was signed by both the Navajos and Hopis for areas within the former joint use area.

Mr. Chairman, I have a lengthy written statement. I would prefer to submit that statement for the record, with your permission, and I will try to summarize our major points verbally, if that is acceptable.

Senator **Melcher**. All your statement will be made part of the record, and I would also prefer you to summarize your major points.

Mr. **Farrand**. Thank you.

Because of the relative short time we have had since the introduction of this bill until the hearing today, I would also seek permission to submit additional materials both on behalf of Peabody and on behalf of the National Coal Association-American Mining Congress Joint Committee on Reclamation.

Senator **Melcher**. We would find it most helpful to receive any additional comments that you do have after these hearings.

Mr. **Farrand**. Thank you.

Generally speaking, we find S. 2879 a very laudable proposal to the extent it attempts to more carefully define the role of tribal governments and their potential jurisdiction over coal mining and reclamation operations and to the extent that it attempts to parallel that program with the existing authorities under SMCRA. However, to the extent it does not parallel SMCRA, we believe that this bill needs some further amendments and further definition, particularly in the areas of judicial review, partial programs, cooperative agreements, and conflicts of interest.

I have six major areas of concern, five of which I would term as refinements. The sixth area is a major concern which, as drafted, would preclude our support for the bill. That issue of greatest concern deals with the provision in section 14 of the bill which requires "complete archeological, historical, and cultural investigations of all such resources prior to" not only mining but prior to consideration of an application for a permit to mine.

As drafted, we find that provision quite vague and, in fact, unattainable. It lacks the normal degree of definitions and standards to make it really enforceable. There is no indication, for example, of how significant the resources have to be in order to be included in the investigation. The use of the word "complete" seems to connote that we have to study all areas within the lease whether or not they are going to be disturbed, which is a major and unnecessary expense. Further, the way it is structured now, it is an extra procedural requirement over which the tribe becomes the sole arbiter of whether the investigation is complete and adequate.

We fully recognize the need and the desire for the tribe to understand what those resources are before they are disturbed, but we would prefer that that investigation be undertaken in conjunction with and not outside of the permitting process, and, further, that the bill provide some very detailed standards and definitions so that both we and the tribes understand what it is we are looking for, to what degree we want those investigations to be made. I would urge, therefore, that the committee provide more detailed standards and definition to that section.

The second area that I want to discuss deals with the combined issues of partial programs and cooperative agreements. Our basic belief is that a partial program, per se, would exacerbate rather than eliminate the current confusion that those of us have who are operating on Indian lands. Essentially, what that implies is that there would be two separate regulatory authorities governing our operations: OSM for those portions of the program not assumed by the tribe, and the tribal regulatory authority itself. We would find that somewhat duplicative and confusing.

Moreover, there is no guidance within SMCRA, there is no precedent within SMCRA, for either partial programs or the cooperative agreements of the type envisioned here, so there is very little guidance given, both to the implementers of this bill and to those of us who are subject to it about how it is going to operate.

Senator **Melcher**. Let me interrupt you there, Chris, because I think we might save a lot of time. I will allow tribal members to look at this and make sure we are right, but I think in drafting the bill, what we are seeking there is a proper opportunity to work in people to learn how to do the job that OSM would be doing if the tribe cannot do it. So, I do not think we really want to get two authorities. I think what we are really trying to do is get part of the authority or part of the people get going on a purpose, but they are still going to have to be subject to OSM until they take over the whole program.

Mr. **Farrand**. I understand that. I think we just arrived at a meeting of the minds. What we would suggest is that in lieu of a partial program as drafted, that there be a process that would entail a cooperative agreement between the Secretary and the tribes to implement a full program. In other words, there would be a partnership implementing one full program—not half here, not half there—and that they would be doing it together for a while until the tribes had the full capability to do it all on their own, but that there not be two programs, a partial one here and a partial one there.

Senator **Melcher**. That is exactly what I and my staff were seeking in the language, but we will have to see what the tribes think of that, if that was the same thing they were thinking.

Mr. **Farrand**. Very good.

I want to compliment you on the bill to the extent it deals with the issue of jurisdiction. This is an issue that is especially critical to Peabody because of our unique situation having an operation that straddles lands under the jurisdiction of two different tribes. At the outset, I want to make a comment about the nature of the definition of Indian lands as contained in section 710 of SMCRA. My understanding—and you were a Member of Congress and dealt closely with that bill—my understanding is that that definition was designed more to guide the study of what to do with Indian lands than it was to define Indian lands for purposes of ultimate jurisdiction.

My point is that jurisdiction should not flow from ownership alone. In other words, if a tribe has a piece of property outside its designated reservation, that should not attach a degree of jurisdiction by the tribe over that land for governmental purposes. Let me make an analogy. If the State of Wyoming came up and bought a large section of land in the State of Montana and owned it and leased it to somebody to mine or to do something else, does that mean that the State of Wyoming should come up and exercise regulatory jurisdiction over that land in Montana? I dare say that your constituents would not think highly of that, and that is an analogous situation to what we would have if we adopted solely the jurisdiction provided in section 3 of this bill.

However, in section 4, the bill carefully limits the actual grant of authority to lands within the exterior boundaries of the reservation. That, we think, is the correct approach and the only suggestion we would have there is that the definition be made consistent with the actual grant of authority. Therefore, we would suggest an amendment to section 3 to that effect.

The fourth area that I would discuss has to do with judicial review. Again, I want to applaud the concept that you have employed in adopting a provision requiring de novo review in Federal court. We have no objection to having tribal courts be the primary jurisdiction over civil cases arising out of the operation of this law. However, we do believe that there ought to be a full-fledged appellate system to back that up, and we have three of four reasons for suggesting that.

The first reason is that there is obviously a mutual lack of familiarity between operators of coal mines and tribal court systems. We are not used to dealing with them and they are, in turn, not used to dealing with the kind of problems we have. We have a problem of getting accredited to appear in those courts as attorneys.

The second reason may be a little awkward to suggest, but the tribal courts lack the kind of background in common law that our court system has built up over many hundreds of years of both British and American case law. Hence, it may be difficult for them to properly interpret a congressional statute. That has not normally been a function of theirs. They have interpreted tribal codes, but not congressional statutes.

It is awkward for a couple of reasons. One is that different tribes have different court systems and they operate differently. For example, the Navajo tribal government doesn't have a constitution. They don't have a bill of rights, say, and it may be very awkward for them to administer laws without a full set of guidelines, both in case law and in a constitution, to effectively do that. Second, because different tribes may have different court systems, they may interpret this law of SMCRA in inconsistent ways. We feel that for the sake of consistent interpretation of law that there ought to be a full-fledged review, not only of the record, but on a de novo basis.

Finally, because many tribes do not have constitutions, there is not the same degree of separation of powers between the executive within the tribal government and the judiciary within the tribal government. Because everyone in that tribal government may have an economic interest in what happens on their land, what operations there are, and what income may be derived thereby, you have the appearance, at least, of a potential conflict of interest. I notice, for example, that in your bill it changes the conflict of interest language from SMCRA to bar only direct interest, not indirect interest. I don't know why that change occurred, but I think that the existence of de novo review would provide a degree of assurance to those of us who are operating on Indian lands that, in fact, there is a full appelate recourse in the event that redress in the tribal court was not sufficient.

I will say that it is our estimation that the majority of the cases arising out of this which have to do with penalties and notices of violation would probably, in fact, be addressed administratively by the regulatory authority or in tribal court. But I think we need that fallback and I laud you for including that provision in there.

We would, however, recommend a clarification of language in section—I think it is 9(d)—and I have attached some suggested language to my testimony, just to make that language granting authority to the Federal courts parallel to the authority granted earlier in that section to tribal courts. It is just a matter of wordsmanship.

The fifth area of concern that I have deals with the issue of conflict of interest. The bill you have introduced is a substantial improvement over an earlier bill introduced in the House. However, there is one conflict of interest problem that remains in our estimation unaddressed. That has to do with a situation that might arise in which the tribe is an operator and an owner of a coal mine operation within the reservation which is now permitted, under the Indian Mineral Development Act, which you sponsored, and is also the regulator of that operation. We find that an inherent conflict of interest. No one should have both a direct ownership and operation interest in a property and be the sole regulatory authority over that property.

We would suggest, therefore, a revision of this bill which would have Indian owned and operated mines subject to the jurisdiction of the Secretary. In other words, they would revert where they had ownership and the actual operation while the tribes maintain the jurisdiction or the regulatory authority over all other operations within their reservation boundaries.

Senator **Melcher**. Permit me to interrupt a moment here, Chris. Isn't the parallel exactly the same where the Federal coal is mined and regulated by the Federal Government?

Mr. **Farrand**. But that is under lease. That is no problem. If they lease us the coal on Indian lands, then there is no problem with their assuming the regulatory authority there. But they do not have a profit interest in that operation.

Senator **Melcher**. The Federal Government does not?

Mr. **Farrand**. They have a royalty interest——

Senator **Melcher**. Is Peabody operating on Navajo coal?

Mr. **Farrand**. Yes.

Senator **Melcher**. Do you have a lease?

Mr. **Farrand**. Yes.

Senator **Melcher**. Is it likely to ever arise that the parallel would not be followed? You would almost always have a lease on Indian coal, would you not?

Mr. **Farrand**. That is true. All of us operating on Indian lands now operate under leases. All of us operating on Federal lands operate under Federal leases. My point is that in those instances, there is no profit involvement in the operation. The income derived from those operations is a royalty based on the gross price of the coal, so the profit margin is solely our responsibility and not their responsibility.

My point is that where they are engaged in the profitmaking, in other words, that their return is based solely on the margin between cost and price, that they should not be the regulator, because they can make adjustments. There is the appearance of a conflict of interest.

Prior to 1982, of course, tribes could only engage in operations through the extension of a lease. They could only lease the coal. Now they can become the operator and the owner of the coal operation.

Senator **Melcher**. Under previous laws, as you well know, we have already allowed Indian tribes to engage in joint ventures in developing their minerals. So, if we would use that method, then they would be joint partners with the operating company. Are you telling us that perhaps we are getting into a very dangerous area, that the company and the tribe might do the wrong things?

Mr. **Farrand**. Let me put it another way, Senator. If Peabody had an operation in western Kentucky in which we had obviously a profit involvement, but somehow, through contract or whatever, we were granted the authority to regulate, not only that operation, but all the surrounding operations owned and operated by other companies, I think people would be concerned that there might be some degree of favoritism or the appearance of some degree of favoritism. Prior to 1982, that circumstance could not arise within an Indian reservation. Now it can. All we are saying is that in order to avoid that appearance, tribes ought to be granted full regulatory authority over all operations except those in which they are the owner and operator. It is kind of the classic fox and the chicken coop, sir.

Senator **Melcher**. That reference to 1982, is that my bill?

Mr. **Farrand**. That is your bill, sir.

Senator **Melcher**. In other words, I have created a terrible——

Mr. **Farrand**. I think we had this discussion in 1982, and your suggestion at that point was that we address it in this bill. Thus far, it is not addressed.

Senator **Melcher**. You are addressing it now. I get the point. There are probably two or three companies involved in Navajo coal right now, are there not?

Mr. **Farrand**. Exactly; there are three. We do not have any problem with their regulating us, but if they have a mine next door to ours, which they own and operate and have a profit interest in, they should not regulate that as well.

Senator **Melcher**. In other words, if they had a joint venture right next to you——

Mr. **Farrand**. They might be tougher on ours than they are on theirs.

Senator **Melcher**. Obviously; that would only be prudent. I see your point and I think it is a very valid one. Will it be hard to correct?

Mr. **Farrand**. No; I do not think so. I think very simply that where the tribe is the owner and operator of an operation, they cannot also be the regulatory authority, but because they own and operate a mine does not mean they cannot be the regulatory authority over all other operations within their jurisdiction.

Senator **Melcher**. All right.

Mr. **Farrand**. I have one final point. That is that while we like the somewhat wholesale incorporation of SMCRA and the reference to tribes as the equivalence of States, we feel that that incorporation deserves more scrutiny than we have been able to give, and we hope that the committee—perhaps with our help—can go through the references to SMCRA and make certain that there are not things that really are not applicable to tribal circumstances and tribal governments. We trust we will have an opportunity to do that.

Senator, I would conclude by saying that the bill is a good starting point from which, we believe, a workable program can be crafted. We particularly favor the parallelism with SMCRA, the judicial review provisions, although we have some slight rewording, the fact that the regulatory authority would coincide with governmental jurisdiction, that it would be limited to lands within the reservation boundaries. On the other hand, we are very concerned about the extra procedural requirements for these archeological, historical, and cultural investigations. We think that needs to be reworked and be made a part of the permitting process with appropriate definitions. We would suggest some refinements to other sections of the bill and we would be happy to work with you to do that.

Peabody has a sort of unique situation in Arizona in that we straddle two jurisdictions. We hope that our testimony can give you some perspective of that particular circumstance. However, I would like to submit for the record, if I may, a statement by the NCA-ANC Joint Committee on Reclamation reflecting the concerns of the industry as a whole.

That concludes my oral remarks. I would be happy to answer any questions you may have.

[The prepared statement follows:]

Prepared Statement of Chris Farrand, Vice President of Government Relations, Peabody Holding Co., Inc.

Mr. Chairman, Members of the Committee, my name is Chris Farrand and I am Vice President of Government Relations of Peabody Holding Company, the parent of Peabody Coal Company.

The purpose of this testimony is to present the views of Peabody concerning S. 2879, the proposed Indian Coal Mining Regulatory Act of 1984. It is our intention to highlight the principal issues of concern to us not addressed in this bill, as well as proposed provisions which, in our judgment, are in need of amendment. As operators on both Indian and non-Indian lands, we would be affected by many of the proposed provisions under the bill which would be unique to operations on Indian lands. In this regard, we have attempted to focus on a goal which could be shared by both operators and the Indian tribes: to wit, an effective Indian lands regulatory program which ensures that operations on Indian lands are not under regulatory mechanisms which are so burdensome that such operations are placed at a competitive disadvantage with operations on non-Indian lands. Hence, to the extent possible, any Indian lands program should parallel the existing Federal lands program of SMCRA. We believe S. 2879 attempts to serve that purpose.

Peabody's present operations on Indian lands currently include two large surface-mines, the Black Mesa Mine and the Kayenta Mine, both located in northeastern Arizona as depicted on the map attached to our testimony.

Coal from the Black Mesa Mine is transported 274 miles by a coal slurry pipeline operated by Black Mesa Pipeline, Inc., to the Mohave Generating Plant located near the Nevada-Arizona border at Bullhead City, Arizona. The plant is jointly owned by Southern California Edison Company, Los Angeles Department of Water and Power, Nevada Power Company, and the Salt River Project Agricultural Improvement and Power District.

Coal from the Kayenta Mine is shipped by coal unit train 90 miles to the Navajo Generating Plant at Page, Arizona. The joint owners of the plant are the Salt River Project, Los angeles Department of Water and Power, Arizona Public Service Company, Nevada Power Company, and Tucson Power company.

The two mines employ nearly 1,000 workers, with 87 percent of those workers being Native Americans. Annual production at the two mines approximates 12 million tons, with Kayenta Mine producing approximately 7 million tons annually for the Navajo Generating Station while the Black Mesa Mine produces approximately 5 million tons annually for the Mohave Generating Plant.

Peabody owns these mines and produces coal under leases signed with the Navajo and Hopi tribes. That portion of the leasehold outside the Former Navajo-Hopi Joint Use Area is held under a lease with the Navajo tribe which was signed in 1964. That portion of the leasehold within the Former Joint Use Area is held under separate leases with the Navajo and Hopi tribes which were signed in 1966.

PRINCIPAL ISSUES

Our testimony today will address the following issues with respect to S. 2879: Definition of "Indian Lands"; partial programs and cooperative agreements; judicial review, penalties, and waiver of sovereign immunity; conflict of interests;' archaeological, historical, and cultural resource investigations; and application of the Surface Mining Control and Reclamation Act of 1977.

DEFINITION OF INDIAN LANDS

S. 2879 would retain the definition of Indian lands contained in the Surface Mining Control and Reclamation Act of 1977. That definition provides that "Indian lands means all lands, including mineral interests, within the exterior boundaries of any Federal Indian reservation, notwithstanding the issuance of any patent, and including rights-of-way, and all lands including mineral interests held in trust for or supervised by an Indian tribe." However, the bill divides the regulatory authority between lands outside and within the exterior boundaries of a reservation, excluding mineral interests.

Peabody believes it was the intent of Congress to give a broad meaning to the term "Indian lands" in SMCRA so that the study report called for by Section 710 would consider the difficulties of asserting tribal jurisdiction over off-reservation lands. However, we fear that since S. 2879 retains the SMCRA definition of Indian lands, but then limits actual jurisdiction of tribal authorities in Section 4, a great deal of uncertainty will result. We are also concerned that retaining the "mineral interest" rights in the definition, but not in Section 4 provisions limiting jurisdiction, will cause confusion and result in litigation over the real intent of Congress. These concerns are further exacerbated by the fact that the words "Indian lands" and "reservations" are used interchangeably throughout the proposed bill.

In light of these difficulties, any regulatory program for Indian lands should avoid the concept that tribal jurisdiction exists automatically wherever there is a tribal ownership interest. The difference between tribal ownership interest and tribal jurisdiction is perhaps most evident in the Former Navajo-Hopi Joint Use Area in which Peabody is presently operating. That area has been the subject of extensive litigation and legislation in an effort to resolve the dispute between the Navajo

Tribe and the Hopi Tribe concerning the ownership of that area. In 1974 and with revisions in 1980, Congress provided for the partition of the so-called Joint Use Area so that each tribe will acquire exclusive governmental jurisdiction over the area partitioned to it as part of its reservation.

While the partitioning legislation provided for the division of the surface, it also provided that the mineral interest would remain under joint ownership of the two tribes. However, under the definition of Indian lands as proposed in S. 2879 governmental jurisdiction over surface mining activities conducted on the Navajo side of the partition line might be extended to the Hopi Tribe as well. Similarly, governmental jurisdiction of the Navajo in lands partitioned to the Hopis might be based on the tribe's retained half-interest in the mineral interest.

The resulting dual jurisdiction, based solely on joint mineral ownership, could throw the Former Joint Use Area into a state of governmental chaos which could threaten the resolution of the Joint Use Area dispute. Recent events have convinced us that this belief is something more than a mere theoretical concern.

In August of 1982 the Tribal Council of the Hopi Tribe enacted two tax ordinances. Both were designed to apply to the entire Former Joint Use Area based on the Hopi's retained half-interest in the minerals of that area. Ordinance 39 sought to impose a severance tax on coal mined anywhere in the Former Joint Use Area. Ordinance 39 sought to impose an annual possessory interest business fee on operations within the Former Joint Use Area. These ordinances were subsequently overturned within the Department of the Interior. The veto was based on the fact that the Hopi Tribe had not provided an opportunity for public notice and hearing prior to enactment of these ordinances. Such procedures would have been necessary under guidelines then being proposed by the Department in response to the decision of the Supreme Court in *Merrion* v. *The Jicarilla Apache Tribe*.

In September of 1983 the Hopi Tribal Council enacted a new ordinance which sought to impose a severance tax on all coal mined from the Former Joint Use Area but at a lesser rate. This revised ordinance was opposed by Peabody, its customers and the Navajo Tribe and was vetoed by the Department on the grounds that it violated the Navajo and Hopi Settlement Act and the due process provision of the Indian Civil Rights Act. The veto decision was based on a Solicitor's memorandum in which there are several points pertinent to Peabody's position regarding the definition of Indian lands, insofar as it might impact the Former Joint Use Area:

"Congress was well aware of the long and tortuous history of the Joint Use Area dispute and well aware that dual jurisdiction over the area had proved unworkable. . . . Clearly, Congress envisioned a solution that would disentangle the tribes as completely as possible, understanding that only division could accomplish the intended lasting resolution. . . .

"Moreover, Congress' evident reason for leaving the minerals in joint ownership was to assure that the two tribes shared equally in the assets of the Joint Use Area. It was not possible to divide the minerals equally because the mineral values of the Joint Use Area were unknown. This rationale for non-partition of the mineral estate does not apply to the drawing of jurisdictional boundaries, to which equality of value has no necessary relation.

"For these reasons I conclude that the Settlement Act demonstrates the necessary clear intent of Congress to terminate the joint reservation and dual jurisdictional status of the mineral estate underlying the Former Joint Use Area and to deprive each tribe of governmental jurisdiction over the minerals underlying the lands partitioned to the other. . . . Indeed, to reach the contrary conclusion, i.e., that Congress intended that a joint subsurface reservation would continue to exist, would be to ignore the virtual certainty that the very dispute Congress intended to resolve would not be resolved but would simply shift from the surface to the subsurface."

It is Peabody's view that the Solicitor has correctly interpreted the intent of Congress in resolving the Navajo-Hopi Joint Use Area Dispute. That resolution provides for the partitioning of the area with the governmental jurisdiction of each tribe to stop at its side of the partition line. The mineral interest in that area is to remain jointly owned by the tribes with that interest jointly managed by the two tribes as co-owners. Such joint ownership, however, is not to serve as the basis for a continued assertion of governmental jurisdiction by one tribe in the area partitioned to the other. To the extent that S. 2879 might be construed to recognize such a governmental jurisdiction based on the retained ownership interest in the minerals, this bill would effectively amend the Navajo-Hopi Settlement Act and related legislation in such a way as to threaten the entire resolution of that long and tortuous dispute.

Therefore, Peabody believes that at least insofar as the Navajo-Hopi Joint Use Area is concerned, Indian lands should be defined so that governmental jurisdiction does not necessarily flow from an ownership interest. Amending the definition in

Section 3 to conform to the actual jurisdiction of trial authorities in Section 4 would satisfy not only our concerns but would also make clear the intent of the bill.

PARTIAL PROGRAMS AND COOPERATIVE AGREEMENTS

S. 2879 provides the tribe with six options under partial programs and cooperative agreements:

1. Partial tribal regulatory program;
2. Full tribal regulatory program;
3. Cooperative agreement with the Secretary providing for tribal participation in the regulation of operations within the exterior boundaries of a reservation under a Federal Indian lands program;
4. Cooperative agreement with the Secretary providing for tribal assumption of regulatory responsibilities as part of implementing a partial tribal regulatory program;
5. Cooperative agreement with the Secretary providing for tribal assumption of regulatory responsibilities as part of implementing a full tribal regulatory program;
6. Cooperative agreement with the state or states providing for tribal participation in the regulation of operations on lands outside the exterior boundary of a reservation.

The concepts of a partial program and cooperative agreements would be unique to operations on Indian lands. Since there are no similar concepts contained in SMCRA which could be referenced, the bill seriously lacks the minimum standards and procedural requirements necessary to implement a partial program. Further, although cooperative agreements are provided in SMCRA to enable state regulatory authority on Federal lands within a state, the Secretary must first determine in writing that such state has the necessary personnel and funding to fully implement such a cooperative agreement. Moreover, the Act also assumed that the state either had, or would receive shortly, an approved state program. Because the appropriate standards and requirements necessary to implement cooperative agreements between the Secretary and Indian tribes cannot be found in SMCRA, they should be carefully spelled out in S. 2879.

Partial programs.—The proposed bill allows an Indian tribe to adopt at its discretion a full or "partial, phased" program for the regulation of surface mining and reclamation on Indian lands.

Peabody believes there are a number of problems associated with the proposed partial program. First, we find no definition of a "partial, phased program". The language appears to suggest that enforcement is the only program area not to be included in a partial program. Moreover, for program areas not covered in a partial tribal regulatory program, there is no provision for an interim regulatory authority or program. As drafted, the bill provides that upon approval of a partial program, that partial program, though incomplete, becomes the sole regulatory program in effect on the designated Indian lands. If the bill did not intend to result in such incomplete programs, the question arises as to whether there would be two separate regulatory authorities operating on a duplicative basis in the area. Dual authorities governing the same operation will create a confusing atmosphere for all parties concerned and may place the operator in an impossible position of becoming the proverbial ping-pong ball, ricocheting between two competing regulatory bodies.

This situation is further complicated by two other factors. First, the bill provides that, prior to approval of a full or partial tribal program or a Federal Indian lands program, the interim effective program shall be Sections 710(c) and (d) of SMCRA. Unfortunately, Section 710(d) of SMCRA has not yet been implemented by the Secretary, although final rules are expected shortly. However, we do not believe OSM has the necessary statutory authority to issue regulations of the scope contained in the proposed rules issued on October 24, 1983.

Second, since a Federal Indian Lands Program may not be in effect at the time a partial tribal program is implemented, it should be remembered that Sections 710(c) and (d) are limited to the imposition of performance standards. For example, Section 710 does not include the reference to Section 506 of SMCRA which provides the authorities for a permitting process. If a tribe elects not to include permitting in its partial program, there would be in effect no authority for issuing permits.

For these reasons, Peabody believes that the proposed partial program will needlessly continue the current regulatory uncertainty of operating on Indian lands, and thereby place coal mining operations on Indian lands at a disadvantage in relation to operations on non-Indian lands.

Perhaps the current regulatory uncertainty can best be exemplified by the present regulatory situation in which Peabody finds itself at its Black Mesa and

Kayenta mines. Currently, there is no SMCRA permit requirement clearly applicable to Indian lands under Sec. 710, but Peabody is required to comply with all performance standards of SMCRA and to provide OSM with documentation establishing such compliance. Moreover, there is no regulatory role for Indian tribes relative to Peabody's operation. We do not believe the current cooperative agreements between OSM and the Navajo tribe granting them such a role are valid, since there is no provision for such agreements with tribes under the statute.

In an attempt to provide some measure of certainty to the regulatory regime in which we found ourselves, Peabody submitted to OSM a document we regarded as a mine plan establsihing a firm system for compliance with the performance standards of the Act. OSM regarded this mine plan as a permit application and, finding it acceptable, issued a permit which was sent to Peabody for acceptance. Because there are no firm permitting requirements, Peabody regarded OSM's action as general approval of our mine plan and concurrence that the Act's performance standards were being met. Peabody accepted it as such but advised OSM that Peabody reserved the right to contest certain aspects of the plan to the extent those aspects rendered it in the nature of a permit. OSM advised Peabody that our position could only be preserved by filing of a formal permit appeal. Peabody filed an administrative appeal, but I think each side hopes that a permanent Indian lands regulatory program will be implemented and that such a program will render the appeal issues moot.

Our experience in this mine plan process takes on a certain absurd quality. Unfortunately, such an exercise is necessary under the present circumstances, in order that each side can protect its respective position while ensuring that the overall purposes of SMCRA are met.

Cooperative agreements.—The third option would allow a tribe to enter into a cooperative agreement with the Secretary under a Federal Indian lands program. Such an agreement would permit tribal participation, on a cooperative basis, in the regulation of surface mining and reclamation activities in the absence of a grant of regulatory authority to the tribe. However, the cooperative agreement mechanism may also be used to implement either a full or partial tribal regulatory program.

With amendments, Peabody believes the cooperative agreement approach to be far less disruptive and uncertain than the partial program concept.

However, we remain concerned that even under a cooperative agreement, there might be two separate regulatory authorities operating on a duplicative basis implementing a partial tribal regulatory program. If S. 2879 assumes tribal assumption of regulatory responsibilities on a piecemeal basis, supplementing a Federal program, we believe the cooperative process will also be as burdensome as a partial program. Moveover, we believe dual regulatory authorities will exacerbate the current uncertainty of operations on Indian lands, placing such lands at a competitive disadvantage with operations on non-Indian lands.

Peabody urges the adoption of a cooperative agreement approach in lieu of a partial program. Specifically, we suggest Option 5 as outlined above and as provided for in the bill. A cooperative agreement approach under which the tribe assumes regulatory responsibilities as part of implementing a full tribal regulatory program would satisfy the same purpose envisioned for a partial program i.e., phased-in tribal participation. Such a cooperative agreement process would also help ensure the relatively smooth transition to full regulatory responsibilities similar to state program approvals without the duplication and confusion likely under a partial program.

JUDICIAL REVIEW, PENALTIES, AND WAIVER OF SOVEREIGN IMMUNITY

The proposed provisions governing penalties and judicial review will help ensure consistent judicial application. We particularly wish to express our support of the provisions providing de novo review in Federal district court of civil actions arising in a tribal regulatory system.

De novo review is necessary because there is a mutual lack of familiarity between coal mine operators and tribal court systems. Secondly, different tribes and different tribal judicial systems may interpret Indian land reclamation laws and regulations in inconsistent ways. A review system involving Federal district courts can help ensure consistent judicial application.

Finally, there is an inherent conflict of interest problem which can arise from the fact that each tribal member may have an economic stake in the outcome of the case simply by virtue of his tribal membership. While S. 2879 provides that such an economic stake by virtue solely of tribal membership does not constitute a conflict of interest with respect to involvement in a regulatory authority, the membership interest nevertheless does exist. It is an interest shared by tribal judges, their family, and friends. Such interests could influence the outcome of a given case, or there may be the appearance that the outcome was so influenced. De novo review in Federal court will eliminate any such taint and ensure those involved in civil actions under a tribal regulatory system of the fairness of the proceeding.

Waiver of sovereign immunity.—Peabody fully recognizes the degree of sovereignty granted to tribal governments by Congress. While Congress provided different levels of sovereignty for different tribes, it appears that some degree of sovereign immunity has been vested with every recognized tribal government. If this immunity were to extend to the exercise of their regulatory authority granted under S. 2879, there may be limited judicial recourse for operators or citizens wronged by the misapplication of that authority. Hence, the lack of a specific waiver of sovereign immunity magnifies the importance of a sound, judicial program granting de novo review. We therefore suggest that Section 9(d) be revised to clarify the role of the Federal courts in reviewing matters originally judged under tribal court procedures. We attach proposed language for the Committee's consideration. We also suggest that a provision be added to S. 2879 to specify that any tribe seeking to assume regulatory authority agree to waive their sovereign immunity in matters arising from the exercise of that authority. Because some tribes may not have the unilateral authority to waive their sovereign immunity voluntarily without Congressional approval, we suggest that the bill provide generic authorization for tribes to waive sovereign immunity as a condition of their acceptance as regulatory authorities.

CONFLICT OF INTERESTS

S. 2879 addresses the potential for conflict of interest associated with persons engaged in regulatory activities who may be employed by or have a direct financial interest in a coal operation.

Peabody had hoped that at some time in the course of development of legislation governing coal mining and reclamation on Indian lands that there would be proposals to deal with the very serious conflict of interest problem which arise from the establishment of tribal authority over tribal-owned and operated surface coal mines. Unfortunately, this problem has not been addressed in S. 2879.

Our concern about the potential for conflicts of interest centers around the fact that, unlike states, Indian tribes can become owners and operators of coal mining ventures while still maintaining regulatory authority over all operations within their jurisdiction. Hence, the crux of the problem would be the dual role of the tribe as both operator and regulator—an inherent conflict of interest.

The most serious problems arise from two sources. First, there are conflict of interest problems where a tribe seeks to assume regulatory authority and also seeks to become a mineral developer by entering into agreement authorized under the Indian Mineral Development Act of 1982 (25 U.S.C. Sec. 2102).

That Act allows tribes to chose to enter into joint ventures, operating agreements and other types of negotiated agreements in which the tribe becomes an equity partner in the development of its own mineral resources. There is an inherent conflict of interest which arises when a tribe seeks to become both a regulatory authority and an active "energy developer" pursuant to the 1982 Act. The most serious of those problems in Peabody's view would be these:

1. Where there is a tribal enterprise actively engaged in coal mining activities, the tribal regulatory authority can bestow a competitive advantage by treating that tribal enterprise more leniently within the tribal regulatory program, in comparison to other non-tribal operations on the reservation.

2. Where a tribe seeks to become actively engaged in developing its own resources pursuant to the 1982 Act, it may seek to do so through the buyout of operations already existing on the reservation. Its role as regulatory authority over such existing operations would allow the tribe to diminish the value of such operations and encourage their sale through the imposition of extremely strict regulatory requirements.

Under regulations proposed by the Department of the Interior, such regulatory authority could even be utilized by a tribe to effect the complete cancellation of its existing leases. On July 12, 1983, the Bureau of Indian Affairs published proposed rules and regulations intended to implement the Indian Mineral Development Act of 1982 and also to revise existing rules pertaining to tribal mining leases.

Under those proposed rules, a mining lease could be terminated if either: (A) After the initial ten-year term of the lease the operators failed to show a profit during any single year; or (B) If operations were suspended for a period of 60 days unless production is shown to be impossible due to some cause clearly beyond the operator's control.

Clearly, SMCRA regulatory authority would give the tribe the ability to bring about, directly or indirectly, the occurrence of these events and thus effectively terminate the mining lease. Neither in the Sec. 710 processes required of the Department to date nor in S. 2879 has there been adequate recognition of potential conflict of interest problems. Peabody believes any effective regulatory program which vests the tribes with any role as regulator must of necessity recognize these potential problems and effectively deal with them. We believe that, as a matter of principle, tribal regulatory authorities should not govern tribal-owned or operated mining ventures and that regulation of such operations should revert to OSM, although the tribe should be able to retain authority over all other operations.

ARCHAEOLOGICAL, HISTORICAL, AND CULTURAL RESOURCE INVESTIGATIONS

Section 14 of S. 2879 requires a "complete" investigation of archaeological, historical, and cultural resources of the proposed mining areas. This provision is especially troubling and could in effect preclude mining on Indian lands.

As drafted, the requirement is so vague as to be almost unattainable. The provision lacks the kind of definition which most statutory requirements must have to be enforceable and effective. The provision contains no standards to describe the resources to be investigated. Moreover, the use of the word "complete" implies that the whole permit area, even lands within the permit boundary not actually disturbed, must be investigated. Moreover, the provision implies that all such resources, regardless of the cultural, historical, or archaeological significance, are to be thoroughly investigated.

Finally, the tribe becomes the sole arbiter of whether the investigation is complete or not complete, even if the tribe is not the regulatory authority. Without proper definitions or standards, or a formal review mechanism for judging the completeness of the investigation, the provision is so vague as to be arbitrary and capricious.

The provision is especially troubling because it is a requirement which comes after the coal has been leased, and, in some cases, after a mine has already been constructed. Because the bill by its reference to SMCRA may require submission or resubmission of all mine plans, the situation may arise in which the lessee/operator has a valid right to the coal and has large investments in a mine, yet by the simple mechanism of refusing to declare the investigation of the archaeological, historical, and cultural resources complete, the lessee/operator is arbitrarily denied the right to mine or even have his application for a mining permit considered.

Section 14 is in need of substantive revision, and Peabody suggests that the consideration of archaeological, historical, and cultural resources be made a part of the normal regulatory process for obtaining mine permits. S. 2879 provides for the approval of tribal regulatory programs, for a Federal Indian lands program and for cooperative agreements. There appears to be ample provision for setting reasonable requirements upon applicants for mine permits. Section 14, as drafted, would impose a separate procedure, outside of the normal permitting process, which is so indefinite as to defy the applicant's ability to comply.

APPLICATION OF THE SURFACE MINING CONTROL LAND RECLAMATION ACT

Peabody appreciates the intent of Section 15 to parallel SMCRA as closely as possible for all other provisions not included in this bill.

For the most part, our testimony has addressed the specific provisions of the bill outside of Section 15. We did not have sufficient time to review and comment on the voluminous provisions of SMCRA applicable which have been incorporated by reference into S. 2879. Because of the inherent differences between state and tribal government circumstances, there may be some inconsistencies or inappropriate applications of law. We are concerned that not enough attention has been focused on this Section. We would urge a more thorough review and opportunity to comment further on the applicable provisions under this section.

CONCLUSION

We conclude this testimony by urging the following revisions to S. 2879:

1. The provision requiring complete archaeological, historical, and cultural investigations prior to consideration of a mining permit should be better defined with attainable and reasonable standards and incorporated as a part of the permit process, not as an extra-procedural requirement.

2. Peabody urges the adoption of a cooperative agreement, with appropriate standards and definitions, between the Secretary and the tribes implementing a full tribal regulatory program as provided in the bill in lieu of a partial program.

3. The definition of "Indian lands" should be revised to reflect the actual granting of authority in Section 4. Moreover, references to "Indian lands" and "reservations" should be made consistent. These changes would remove any confusion about the intent of the bill.

4. While the basic provision governing judicial review is appropriate, we suggest a revision of subsection 9(d) to clarify the role of the Fedeal courts in reviewing tribal court judgments under the proposed program, and we attach specific language to this effect.

5. While clarification of the Indian lands definition and the judicial review provisions would substantially lessen our concern about potential conflicts of interest, we would suggest a revision which would bar tribal regulation of Indian-owned and Indian-operated mining ventures.

6. Finally, time has not yet permitted us to thoroughly review the relationship of S. 2879 to SMCRA to be certain that the treatment of tribes as the equivalent of states is appropriate in all instances. The broad incorporation of SMCRA into circumstances relating to coal mining on Indian lands warrants a more detailed review than we have thus far been able to conduct, and we hope we will be able to work with the Committee to suggest changes which might become evident by such review.

In sum, S. 2879 is a laudable proposal from which a final legislative solution can be molded. We would characterize many of the suggestions we have made as refinements, with the notable exception of Section 14, the requirement for archaeological, historical, and cultural investigations. This provision is unworkable in its present form, and it precludes our support for the bill.

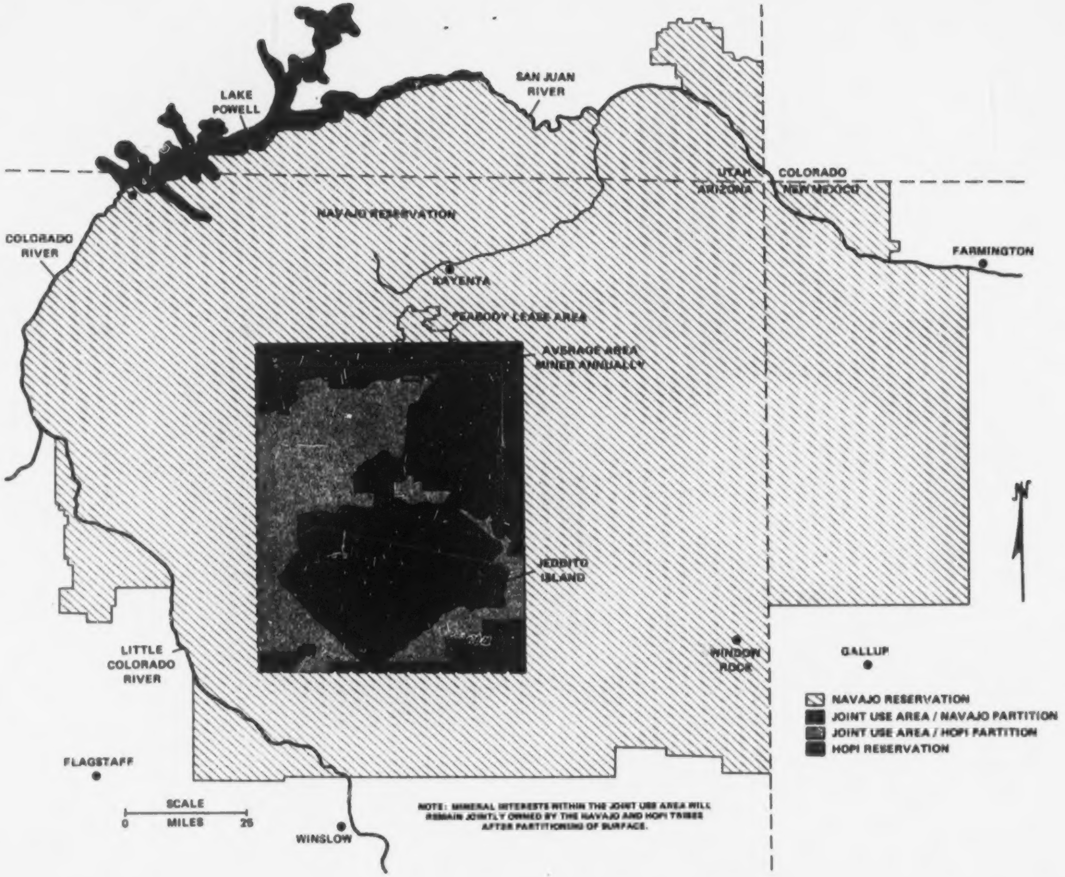
We feel that our perspective as an operator on Indian lands and our unique circumstances with regard to the Former Navajo-Hopi Joint Use Area could shed some light on specific problems associated with S. 2879. However, I would like to submit for the record written testimony prepared by the National Coal Association/American Mining Congress Joint Committee representing the broad concerns of the coal industry as a whole.

Peabody Coal Company and its parent, Peabody Holding Company, appreciate the opportunity to present this testimony to the Select Committee on Indian Affairs. It is our hope that today's hearing will provide the beginning of a basis for a fair and effective regulatory program for coal mining activities on Indian lands. We will be happy to provide further comment and assistance to the Committee members and staff, as well as testify at future hearings, in this effort.

Amendment to Section 9

Delete Section 9(d) and substitute the following:

(d) Notwithstanding any other provision of law, the district court of the United States shall have jurisdiction over any appeal of a final tribal court judgment rendered under the provisions of this Act. Review of tribal court judgment shall be *de novo* and subject to the standards set forth in Section 706 of title 5, U.S.C.


LAKE POWELL
SAN JUAN RIVER
UTAH
ARIZONA
COLORADO
NEW MEXICO
NAVAJO RESERVATION
COLORADO RIVER
KAYENTA
FARMINGTON
PEABODY LEASE AREA
AVERAGE AREA MINED ANNUALLY
JEDDITO ISLAND
N
WINDOW ROCK
GALLUP
LITTLE COLORADO RIVER
FLAGSTAFF
SCALE
0 MILES 25
WINSLOW
▨ NAVAJO RESERVATION
■ JOINT USE AREA / NAVAJO PARTITION
▩ JOINT USE AREA / HOPI PARTITION
■ HOPI RESERVATION

NOTE: MINERAL INTERESTS WITHIN THE JOINT USE AREA WILL REMAIN JOINTLY OWNED BY THE NAVAJO AND HOPI TRIBES AFTER PARTITIONING OF SURFACE.

Senator **Melcher**. I have no more questions. I think you have made your points very well. I want to thank you and all the other witnesses for going into this as much as you have. This is a pretty good critique of the bill, Chris, in your case, and it is rather thorough. We very much appreciate that.

In a very short time we will adjourn Congress. Calling this hearing at this late date before adjournment is something I wasn't going to do; then it dawned on me, if we are going to pass a bill this year, we would like to at least have that opportunity. So now we have had this hearing today and then we must allow the next 3½ weeks for some scrutiny of the points raised and see whether we can get close to working out the bill so that it is acceptable and then take our shot in September to see whether or not Congress wants to pass it.

Now, we would like to be at a point right after Labor Day to where we feel confortable with the bill. If that is possible, then we will do everything possible to pass it before the end of this Congress. I think we ought to make that clear. It is a major effort to arrive at a satisfactory bill in the first days of September so that we can then attempt to pass it in this Congress rather than letting it die and starting it fresh in the next Congress. But if that is the way it has to be, if we cannot do it, we cannot do it. We will start again next Congress, but time is wasting and all the opportunity that we can take now to see whether we can arrive at a good bill, I think, will be very worthwhile.

I want to thank you very much, Chris, for your help. We will be discussing these points and we will be seeking the advice of the tribes and the Department to see what we can deduce.

I want to announce that the hearing record will be open until September 1. That happens to be 3 weeks, I believe.

Our next witness is Edward Grandis, director of the Citizens Mining Project of the Environment Policy Institute.

Good morning, Ed. Please proceed.

STATEMENT OF EDWARD GRANDIS, DIRECTOR, CITIZENS MINING PROJECT, ENVIRONMENTAL POLICY INSTITUTE

Mr. **Grandis**. Thank you, Senator.

Senator, I would like to personally thank you for the invitation to present testimony today on your bill, S. 2879, the Indian Coal Mining Regulatory Act of 1984. Before I get to my text, I just want to say that this reminds me of the many years we sat and discussed the surface mining act back in the 1970's, and we are very glad to see that you have been diligent in making sure that all the lands in this country have the protection that Congress wanted, and I am sure that you would have wished that this bill could have been before you before today. We welcome the opportunity to work with you and your committee in getting this bill out promptly.

Senator **Melcher**. Thank you.

Mr. **Grandis**. I am Edward Grandis. I am the director of the Citizens Mining Project of the Environmental Policy Institute. EPI is a nonprofit, tax exempt, research organization that focuses upon the environmental impacts of energy development. We support increased coal mining to support our domestic and export coal needs, provided that such activity occurs in an environmentally sound manner and that citizens have adequate means to exercise their rights.

This committee and, in particular, Senator Melcher, should be congratulated for initiating this hearing to discuss an Indian lands mining regulatory bill. Congress, in 1977, authorized the Secretary of the Interior to submit proposed legislation to protect the environment and the rights of the public regarding coal mining on Indian lands not later than January 1, 1978. The Department of the Interior failed to meet this deadline by 6 years. Only through the congressional pressure exerted by this committee and the House Interior Committee did the Secretary submit the report in January of this year.

Unfortunately, instead of resolving as requested such critical issues as jurisdiction, judicial review, and citizens suits, the Department merely outlined the debates of the last decade and returned these issues and others to Congress for resolution. This committee recognized the dire environmental consequences of not resolving the legal cloud that has prevented these lands from enjoying the same protections as non-Indian lands which have been in effect since the passage of a Federal Surface Mining Control and Reclamation Act of 1977.

We come today to offer our support to work with this committee on passage of legislation which will provide Indian lands the same environmental protections as accorded to non-Indian lands and the public the same rights to exercise in protecting the environment of these areas as afforded in the 1977 act. Additionally, we support the tribes in their desire to be the exclusive regulatory authority over Indian lands within the exterior boundaries of their reservation and for cooperation between the tribes, States, and the Federal Government on Indian lands outside such boundaries. Therefore, we want to express our appreciation to Senator Melcher for his leadership in introducing S. 2879 and bringing the various interests to this table to discuss our respective concerns.

We offer our support for the bill with the following recommendations:

Under any Indian lands bill, EPI's position on jurisdiction as it relates to the regulation of coal mining on Indian lands rests on two principles: first, the principle of fairness. The tribes, in assuming the responsibilities of this bill, should be provided rights equal to their obligations. Our second concern is environmental protection and citizen rights. The only purpose behind this legislation should be to provide for reclamation of abandoned lands, environmental protection for existing and future coal mining operations, and the ability for the public to assure compliance. This bill should in no way impact issues beyond environmental protection of these areas. Nor should it be drafted in such a manner that it could provide fodder for attorneys who may wish to use an environmental bill in their legal arguments to resolve taxation and other issues.

Therefore, we recommend: (a) Regulatory authority within the reservations should rest solely with the tribe if it meets the criteria for an approved regulatory program as set out in this bill; (b) regulatory authority on Indian lands outside the exterior boundaries of a reservation should be by cooperative agreement between the tribe, State, and Secretary; and (c) regulatory authority, if a tribe fails to obtain an approved tribal regulatory program, or if a cooperative agreement is not reached, rests solely with the Secretary.

Turning to the issue of tribal de novo, we support the tribes in their position that tribal court judgments be subject to the standards set forth in section 706(2) of title 5 of the United States Code and current judicial law. In some instances, this will result in a de novo review but will preserve, at the same time, the integrity of the tribal court system.

Another area of interest is the abandoned mine reclamation fees on Indian lands. On Indian lands outside the exterior boundaries of any Federal Indian reservation, we support the tribes' desire to obtain and receive 50 percent of these fees. We also support 50 percent of the remaining share to go to the Federal share to be allocated to the State. On Indian lands inside the exterior boundaries of Federal Indian reservations, we support these fees being split 85 percent for the tribe and 15 percent to the Federal share for allocation to the tribe.

We offer our assistance to this committee to work out specific language to achieve these objectives. Additionally, we welcome the opportunity to work with this committee to further explain our positions in a mutual desire to move this bill forward. Our goals, I am sure, are similar. The coal industry, the States, the tribes, and the public need this legislation so that mining can continue on Indian lands and that congressional desires for stringent, uniform environmental regulation is provided for all coal mined lands within the United States.

That concludes my testimony, except to say that regarding the other areas of the bill, we are in complete agreement. We welcome the opportunity to work with your staff. We would like to thank you today for the opportunity to testify.

Thank you, Senator.

Senator **Melcher**. Thank you very much, Ed, for the testimony and the suggestions.

The 1977 act was very much a product of Congress and concerned citizens. The concerned citizens which I think were the most important part of that equation delivered a fairly good bill. It has worked pretty well.

Mining goes forward, particularly in the West, where we did not have mining of any great consequence until we knew just where we were going. Leading the concerned citizens in their grassroots effort for a national strip mining bill was what you now call the Environmental Policy Institute.

I suppose the name was altered because you have grown some and have further responsibilities, but we always knew it as the Environmental Policy Center.

Mr. **Grandis**. Thank you very much.

Senator **Melcher**. The people of this country rallied around the efforts of the Environmental Policy Center, and it does not happen all that often that one single group rallies and becomes the true leader of a citizens effort, but that did occur with the Environmental Policy Center and the national strip mine bill. I want to compliment you and all the people with whom you work for that leadership.

Mr. **Grandis**. On behalf of Louise and the Institute, we greatly appreciate your respect and the compliment. Thank you very much.

Senator **Melcher**. Yes, we should get Louise Dunlap's name very prominent in this hearing record. It was, indeed, her leadership, above all else, that permitted a national strip mine bill to be passed by Congress. Thank you very much.

Mr. **Grandis**. Thank you.

Senator **Melcher**. Our next witness is Ellis Knows Gun of the Crow Office of Reclamation.

Welcome, Ellis. How is the weather up at your latitude?

Mr. **Knows Gun**. Very good. Kind of warm up there in Montana. Things are pretty good at this point.

Senator **Melcher**. I am glad to hear that.

STATEMENT OF ELLIS KNOWS GUN, CROW OFFICE OF RECLAMATION, ABANDONED MINE LAND PROGRAM, CROW AGENCY, MT

Mr. **Knows Gun**. Mr. Chairman and members of the committee, my name is Ellis Knows Gun, and I am here today along with our attorney, Mr. Tom Fredericks, to discuss our tribe's concerns on S. 2879. I will primarily focus on key administrative issues pertaining to the proposed legislation, and our attorney will focus on the legal issues. I will now begin our tribe's testimony.

Since the passage of the Surface Mining Control and Reclamation Act of 1977, Public Law 95-87, commonly referred to as SMCRA, Indian tribes have clearly expressed their views on the need to implement SMCRA on Indian lands. This complex undertaking has been accomplished through participation in the Indian lands study mandated by Congress under section 710 of the act, and through comments to the Secretary of the Interior since 1977, and in subsequent testimony at hearings before this Congress.

Congress, in establishing the SMCRA law and recognizing the special jurisdictional status of Indian lands, authorized a study report under SMCRA which was to have included proposed legislation designed to allow Indian tribes to elect to assume full regulatory authority over the administration and enforcement of regulations of surface mined coal on Indian lands. The study report required, under section 710(a), that together with drafts of proposed legislation, the view of each Indian tribe affected was to be submitted to Congress as soon as possible but not later than January 1, 1978. Understatedly, Senator Melcher, more than 6 years have passed and the tribes are still in a legislative vacuum.

Under section 710 Congress in its efforts to clarify the Indian lands issue clearly defined "Indian lands" to mean "All lands including mineral interests within the exterior boundaries of any Federal Indian reservation notwithstanding the issuance of any patent, and including rights of way and all lands including mineral interests held in trust for or supervised by an Indian tribe." This position was further enhanced and substantiated by OSM in letters dated December 17, 1981 and December 8, 1982.

Congress in recognizing the inherent and legal right of tribes to develop their title 5 regulatory programs and their title 4 abandoned mine lands programs, authorized the OSM within the U.S.

Department of the Interior to begin collecting the AML reclamation fees from various tribes affected under the act. Since there are a substantial number of acres of Indian lands throughout the United States previously disturbed by past surface mining and underground mining for which little or no reclamation was conducted, and the impacts from the past coal mining pose serious health hazards to life and property, OSM was instrumental in beginning the development of title 4 AML and title 5 regulatory programs for the Indian tribes. Although the Crow Tribe has been involved in this process and appreciates OSM's assistance on developing tribal capabilities, there can be no substitute for strong and effective Indian surface mining legislation to free up the Crow Tribe's share of AML reclamation fees and to provide the necessary authority under the act to gain primacy in much the same manner as the States are afforded this same opportunity.

In addressing the Indian lands issue Congress recognized the sovereign governmental status of tribal governments and that any subsequent legislation to be applied to the Indian tribes must advance the concept of tribal self-determination to protect the unique cultural values and identities of the various Indian tribes to be affected by legislation.

It is within this background of Indian legislative record on surface coal mining of Indian lands that the Crow Tribe, as a large owner and producer of coal, must address S. 2879, "a bill to provide for cooperation between the Secretary of the Interior and Indian tribes with respect to the regulation of coal mining operations on Indian lands and acquisition and reclamation of abandoned mine lands and for other purposes." This particular version of the Indian Coal Mining Regulatory Act of 1984, as currently presented, does not have the internal, explicit language required to implement a meaningful title 4 AML or a title 5 regulatory program on Indian lands.

S. 2879, in its present form, has not integrated systematically many of the key provisions which were identified by the tribe as being major necessary provisions required for successful legislation regarding the section 710 issue.

Now to the title 4 AML provisions under section 5, the tribal abandoned mine reclamation fund. The language present in S. 2879, as submitted on July 27, 1984, does not contain language authorizing the Crow Tribe to access their 50 percent share for AML reclamation fees collected by OSM on behalf of the Indian tribes for AML reclamation problems on Indian land.

In order to establish a meaningful title 4 program or a title 5 regulatory program on Indian lands and in an effort to reach a tribal consensus on Indian lands legislation which has been carefully built, documented, and maintained by the affected tribes, S. 2879 should be amended by Congress to insure that the radical departure from the previous consensus reached by the Indian tribes is addressed in a meaningful manner that is acceptable to the tribes. At a minimum, the Crow Tribe strongly recommends under the title 4 provisions that the following language as presented to Indian tribes in the May 3, 1984 draft be incorporated once again into S. 2879:

Specifically, the Crow Tribe requests the Congress of the United States to continue to use language that will provide substance to the AML provisions. The language as presented on May 3, 1984, was well received by the Indian tribes and the tribes concurred in using the following language:

"(B) All funds hereinafter collected from mining activity on such lands pursuant to section 401(b) of such act.

"Part 3. For coal produced outside the exterior boundaries of Indian reservations and held in trust by the United States for an Indian tribe or owned by an Indian tribe, the revenues collected pursuant to section 402(a) of the Surface Mining Control and Reclamation Act (30 U.S.C. 1231a) shall be allocated—

"(A) 50 percent to the abandoned mine reclamation fund under section 402(g)(2) of such act to be credited to the Federal share for the State in which the coal is located; and (B) 50 percent to the tribal fund for the respective Indian tribes under subsection (a)(2) of this section."

"(b) The Secretary of the Interior shall invest, on a quarterly basis, all receipts accruing to the tribal fund:"

Under part (C), "All funds in the tribal fund shall be expended on Indian lands to meet the purposes of this Act." No. (2) is, "Eighty-five percent of the funds deposited in the tribal funds annually shall be allocated by the Secretary to the Indian tribe having the ownership interest," and No. (3) is, "In the event of multiple tribal ownership interests in the coal, the funds shall be allocated to the Indian tribes under paragraph (2) of this subsection in direct proportion to their ownership interests."

(4) The balance of the funds collected on an annual basis shall be expended upon appropriation on Indian lands, including those Indian lands from which no funds have been derived but which have been adversely affected by past mining and should be reclaimed to meet the purposes of this act. Such funds may be expended directly by the Secretary or by making grants to approved tribal reclamation programs pursuant to section 3 of this act. The Secretary shall consult and coordinate with respective Indian tribes regarding those projects funded directly or in conjunction with other Federal agencies."

The Crow Tribe feels very strongly that the aforementioned language as presented in the May 3, 1984, draft will go a long way in clarifying who rightfully should receive the AML reclamation fees and no further confusion will arise on this issue.

Title 5 regulatory provisions: To ensure that Indian tribes are provided with legislation that will allow Indian tribes to effectively regulate coal mining activities on Indian lands, Indian tribes must be afforded the same opportunity provided and guaranteed to the States with approved permanent regulatory programs. This includes the same element of participation for enforcing SMCRA on Indian lands, that is, if Congress' clearly defined intentions under section 7 of the act are to be effectively implemented concerning SMCRA's application to Indian lands.

Simply put, we need to have incorporated into S. 2879 specific language which will provide for civil penalties. We ask now that this Congress use page 8 in its entirety as presented in the May 3, 1984 draft, entitled, "Indian Coal Mining Regulatory Act of 1984."

Recognizing that Indian tribes own and control an estimated 15 percent of the country's coal resources which may be recovered by surface mining methods including nearly one-third of the low-sulphur strippable coal of the Western United States, it seems entirely proper that Congress would allow the Indian tribes with the necessary mechanisms and standards to regulate coal mining activities in an environmentally compatible manner as envisioned by Congress in the Surface Mining Control and Reclamation Act of 1977.

Mr. Tom Fredricks, our attorney, will now address the legal issues affected by this proposed legislation, and I thank you, Senator Melcher, for allowing me to address this committee.

Senator **Melcher**. Thank you.

The material you submitted will be inserted in the record at this point.

[The material follows. Testimony resumes on p. 104.]

Attachment to Crow Tribe's testimony dated 8-10-84....5 page letter.

CROW TRIBAL COUNCIL
Office of the Chairman
P.O. Box #580
Crow Agency, Montana 59022

Crow Country

July 11, 1984

The Honorable Senator John Melcher
United States Senator
730 Hart Building
Washington D. C. 20510

Attention: Max Richmond

Dear Senator Melcher:

As you are aware, the Crow Tribe is a major owner and producer of Coal. For years, we have actively participated in the many exhaustive studies and comments which the Tribes have submitted to OSM (CERT Indian Lands Recommendations - Jurisdictional Analysis by U.S. Department of the Interior, etc.) and the U.S. Congress regarding proposed "Indian Lands" Legislation under Section 710 of the Surface Mining Control and Reclamation Act of 1977 (SMCRA). Few pieces of proposed legislation, in fact, have undergone such thorough study and documentation by the Crow Tribe, the other Indian Tribes, the U.S. Department of the Interior, and the U.S. Congress resulting in such evaluation and clear analysis of the issues presented.

It is within this framework of evaluation and clear analysis that the Crow Tribe on June 14, 1984 submitted to your office our request to have you introduce the May 3, 1984 draft bill of the "Indian Coal Mining Regulatory Act of 1984" to the 98th Congress and to hold hearings as quickly as possible.

Based on all the issues presented, it is our firm belief and conviction that within Congress's intent to allow Indian Tribes to regulate coal strip Mining on Indian Lands as evisioned by SMCRA that Congress fully intended that the Indian Tribes in meeting the minimum requirements of SMCRA would have been provided clear authority to regulate coal mining activity on Indian Lands. Tribes in effect due to their special jurisdictional status should be treated as the States for the purpose of SMCRA. We wholeheartedly support this concept and laud your particular efforts in this area.

Within this important concept of the SMCRA Law which authorized State-Tribal participation by Congress, the U.S. Department of the Interior through the Office of Surface Mining has authorized the Crow Tribe to begin developing its Title IV (AML) and its Title V (Regulatory) capabilities under SMCRA. Indeed the Crow Tribe was the first tribe to establish an Abandoned Mine Lands Program and a Regulatory Program and we are proud of our successes in this area, particularly since we have been confronted with very significant obstacles in developing our programs.

The most fundamental of these problems of course, concerning our Tribe is the fact that Tribes under Section 710 of the Surface Mining Control and Reclamation Act of 1977 do not yet have legislation allowing Tribes to regulate mining activities on Indian Lands and without specific legislation concerning coal stripmining IndianTribes cannot access our 50% share of the Abandoned Mine Lands Reclamation Fees. Without authorizing Indian Lands Legislation which is now over six years overdue, the result has been that the Tribes are treated as step children under the OSM both from a policy and funding standpoint. While OSM has been cooperative with the Tribe in addressing these problems, OSM has admitted that unless authorized Section 710 legislation is made available, problems concerning strip mine activity on Indian Lands will continue to grow and escalate. In addition to these problems Tribes have encountered unwarranted questions regarding their programmatic legitimacy and have been completely dependent on the largesse of the Secretary in disbursing his "limited" discretionary funds to develop their programs.

To ensure that our Section 710 problems are dealt with in a fair and constructive manner, the Crow Tribe strongly urges you and your constituents in Congress to push forward with your intentions to develop and establish your draft bill entitled "Indian Coal Mining Regulatory Act of 1984". Specifically, under Title IV - Tribal Abandoned Mine Reclamation Fund (please refer to page 3, which is attached) we need to have specific language which spells out our authorized share of the AML Reclamation Fees to address our Title IV problems on Indian Lands.

letter to Senator John Melcher (page 3).

Specifically, we ask that you continue to use the following language as previously provided in your May3, 1984 draft bill concerning Title IV AML provisions under Section 4. and which recieved concurrence by the affected Tribes:

"(B) All funds hereinafter collected from mining activity on such lands pursuant to section 401 (b) of such act.

(3) For coal produced outside the exterior boundaries of Indian reservations and held in trust by the United States for an Indian tribe or owned by an Indian tribe, the revenues collected pursuant to section 402 (a) of the Surface Mining Control and Reclamation Act (30 U.S.C. 1231 (a) shall be allocated--

(A) 50 percent to the Abandoned Mine Reclamation Fund under Section 402 (g) (2) of such act to be credited to the federal share for the state in which the coal is located; and

(B) 50 percent to the Tribal Fund for the respective Indian tribe under subsection (a) (2) of this section.

(b) The Secretary of the Interior shall invest, on a quarterly basis, all receipts accruing to the Tribal Fund, (please refer to attached page 4 concerning completion of section (b) as contemplated by Senator Melcher).

(c) (1) All funds in the Tribal Fund shall be expended on Inidan lands to meet the purposes of this Act.

(2) Eighty-five percent of the funds deposited in the Tribal Funds annually shall be allocated by the Secretary to the Indian tribe having the ownership interest.

(3) In the event of multiple tribal ownership interests in the coal, the funds shall be allocated to the Indian tribes under paragraph (2) of this subsection in direct proportion to their ownership interests.

(4) The balance of the funds collected on an annual basis shall be expended upon appropriation on Indian lands, including those Indian lands from shich no funds have been derived but which have been adversely affected by past mining and should be reclaimed to meet the purposes of this Act. Such funds may be expended directly by the Secretary or by making grants to approved tribal reclamation programs pursuant to section 3 of this Act. The Secretary shall consult and coordinate with respective Indian tribes regarding those projects funded directly or in conjunction with other Federal agencies."

letter to Senator John Melcher (page 4).

We firmly belief that the aforementioned language as presented in your May 3, 1984 draft will allow the affected Indian Tribes to deal effectively with Title IV problems on Indian Lands and we appreciate your efforts on Title IV Issues (page 4 of Senator Melcher's draft bill is also attached).

To ensure that Indian Tribes be provided with legislation that will allow the Indian tribes to effectively regulate coal mining activity on Indian Lands, Indian Tribes must be afforde the same opportunities provided to the states with approved permanent regulatory programs. This includes the same element of participation for enforcing SMCRA on Indian Lands, if Congress's clearly defined intentions are to be met concerning SMCRA's application to Indian Lands. Simply put, we need for you to continue to incorporate specific language as presented in your May 3, 1984 draft bill concerning civil penalties. We ask that you continue to use page 8 in its entirety as presented in the May 3, 1984 draft bill. We refer you also to page 8 which is included for your reference.

In closing, we continue to feel strongly that Congress's intentions for addressing coal mining problems on Indian Lands and for applicable regulation of mining activity caused by past and present surface mining operations can best be handled by the affected Indian Tribes and we support Congress's Policy which favors tribal self-determination and which regognizes the special culture values and identities of Indian Tribe.

Recognizing that Indian Tribes own and control an estimated 15 per cent of the country's coal resources which may be recovered by Surface mining methods, including nearly one-third of the low sulfur strippable coal of the western United States, it seems wholly justifiable that Congress would allow the Indian Tribes with the neccessary standards to regulate coal mining in an environmentally compatible manner as envisioned by Congress in the Surface Mining Control and Reclamation Act of 1977.

We appreciate your continued role on these highly important matters and we appreciate this opportunity to express our concerns on matter which affect our people in a deeply profound manner. We are aware that this important legislation will have a significant impact on our Indian people and we welcome your support and efforts on behalf of the Indian tribes.

Sincerely,

Mr. Donald Stewart Sr.
Chairman, Crow Tribe of Indians

Attachment to Crow Tribe's testimony dated 8-10-84.

Crow Tribe goes on record requesting that this page be made a part of Senate bill S. 2879. Hearing held 8-10-84.

029820.154 S.I.C.

3 . Melcher Bill May 3, 1984 Draft

Interior.

TRIBAL ABANDONED MINE RECLAMATION FUND

Sec. 4. (a)(1) There is hereby created within the Treasury of the United States a trust fund to be known as the Tribal Abandoned Mine Reclamation Fund (hereinafter referred to as the ''Tribal Fund'') which shall be administered by the Secretary of the Interior. The Tribal Fund shall be administered separately from, and without regard to, the Abandoned Mine Reclamation Fund created under the Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. 1201 et seq.).

(2) The Tribal Fund shall consist of--

(A) all amounts deposited pursuant to section 401 (b) of the Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. 1231 (b)) which were generated by mining activities within the exterior boundaries of Indian reservations prior to the date of enactment of this Act; and

(B) all funds hereinafter collected from mining activity on such lands pursuant to section 401 (b) of such Act.

(3) For coal produced outside the exterior boundaries of Indian reservations and held in trust by the United States for an Indian tribe or Indian or owned by an Indian tribe, the revenues collected pursuant to section 402 (a) of the Surface Mining Control and Reclamation Act (30 U.S.C. 1231 (a)) shall be allocated--

[illegible]

(A) 50 percent to the Abandoned Mine Reclamation Fund under section 402(g) (2) of such Act to be credited to the federal share for the State in which the coal is located; and

(B) 50 percent to the Tribal Fund for the respective Indian tribe under subsection (a) (2) of this section.

(b) The Secretary of the Interior shall invest, on a quarterly basis, all receipts accruing to the ~~such portion of the~~ Tribal Fund ~~as is not,~~ *

[illegible]

[illegible] 102(g)(2) [illegible]

Attachment to Crow Tribe's testimony dated 8-10-84.
Crow Tribe goes on record requesting that this page be made a part
of Senate Bill S. 2879, Hearing held 8-10-84.

[illegible]

029820.154 S.L.C.

4 **Melcher Bill May 3, 1984 Draft**

~~in his judgment, required to meet current withdrawals.~~ Such investments shall be in public debt securities with maturities suitable for the needs of the Tribal Fund and bearing interest at rates determined by the Secretary of the Treasury, taking into consideration current market yields on outstanding marketable obligations of the United States of comparable maturities. The income on such investments shall be credited to, and form a part of, the Tribal Fund.

Need memo re Sec'ity ability.

(c) (1) All funds in the Tribal Fund shall be expended on Indian lands to meet the purposes of this Act.

(2) Eighty-five percent of the funds deposited in the Tribal Fund annually shall be allocated by the Secretary to the Indian tribe having the ownership interest.

(3) In the event of multiple tribal ownership interests in the coal, the funds shall be allocated to the Indian tribes under paragraph (2) of this subsection in direct proportion to their ownership interests.

(4) The balance of the funds collected on an annual basis shall be expended upon appropriation on Indian lands, including those Indian lands from which no funds have been derived but which have been adversely affected by past mining and should be reclaimed to meet the purposes of this Act. Such funds may be expended directly by the Secretary or by making grants to approved tribal reclamation programs pursuant to section 3 of this Act. The Secretary shall consult and coordinate with the respective Indian tribes regarding those projects funded directly or in conjunction with other Federal agencies.

(d) Notwithstanding paragraphs (2) and (4) of subsection (c) of this section, all funds identified in subsections (a) (2) (A) and (a) (3) of this section, and through the end of the reporting quarter which includes the date of enactment of this Act, shall be allocated to those Indian tribes from whose lands such funds were derived.

(e) Indian tribes, pursuant to an approved tribal

Attachment to Crow Tribe's testimony dated 8-10-84.

Crow Tribe goes on record requesting that this page be made a part of Senate Bill S. 2879. Hearing held 8-10-84.

Melcher Bill May 3, 1984 Draft

(e) of such section.

PENALTIES

Sec. 8. (a) Notwithstanding the penalty provisions of Public Law 90-284 (25 U.S.C. 1301, et seq.), popularly known as the Indian Civil Rights Act, the civil penalty provisions of any tribal program shall incorporate penalties no less stringent those those set forth in section 518 of the Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. 1268) and shall contain the same or similar procedural requirements thereof.

(b) Tribal courts or any other tribal authority designated in an approved tribal program shall have original jurisdiction to impose civil penalties and sanctions on all persons who violate this Act (including members of the Indian tribe and individuals who are not members of the Indian tribe) who are engaged in surface coal mining and reclamation operations on Indian lands.

(c) Civil penalties imposed under this Act may be recovered in a civil action brought by the tribal regulatory authority in tribal court.

(d) Any final tribal court judgment rendered under the provisions of this Act shall be appealable to a district court of the United States. Review of tribal court judgments shall be based upon the tribal court record and subject to the standards set forth in section 706(2) (b) of title 5, United States Code.

(e) (1) Except as provided in paragraph (2), nothing in this Act shall be construed to eliminate any additional enforcement rights or procedures which are available under tribal or Federal law to a tribal regulatory authority but are not specifically enumerated herein.

(2) Nothing in this Act shall be construed as granting tribal courts criminal jurisdiction over any person who is not an Indian.

Attorneys
Richard Dauphinais
Arlinda F. Locklear
Henry J. Sockbeson

Native American Rights Fund
1712 N Street, N.W. • Washington, D.C. 20036-2976 • (202) 785-4166

Executive Director
John E. Echohawk

Deputy Director
Jeanne S. Whiteing

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Attachment to Crow Tribe's testimony dated 8-10-84.....2 page letter.

July 27, 1984

Honorable John Melcher
United States Senate
Washington, D.C. 20510

Dear Senator Melcher:

I am writing this letter on behalf of my client, the Council of Energy Resource Tribes (CERT). A number of CERT's member tribes, including the Crow and Fort Berthold Tribes, own coal and are directly interested in passage of the Indian coal mining bill of 1984. I would like to address three concerns that my clients have regarding the June 27, 1984, revisions.

My first concern is that the bill is silent as to how Abandoned Mining Lands (AML) funds derived from off-reservation Indian lands are distributed. Currently, the Secretary of Interior (Secretary) applies fifty percent of these monies to the Indian tribe that owns the coal. We think this practice should continue and it is my understanding that you share this view.

However, because the bill does not address the off-reservation apportionment but does define how on-reservation monies are to be applied, the section leaves the states with the argument that tribes are entitled only to on-reservation monies. It may be possible to cure this problem by inserting strong language in the record which indicates that the current secretarial practice is intended to continue but, without such language, I think the tribes risk losing AML income to which they are rightfully entitled.

Secondly, the provision governing the Secretary's fifty percent discretionary on-reservation share is confusing (see section 5(c). It provides that:

> . . . such funds may be expended directly by the Secretary or by making additional grants to approved State reclamation programs pursuant to section 405 (of SMCRA) . . . or to approved tribal regulatory programs . . . (Emphasis added.)

I believe that the bill is intended to provide for tribal or federal primacy on Indian lands but the inclusion of the "state reclamation programs" language would seem to open the door to state on-reservation jurisdiction. While I think that the tribes could successfully defeat any such interpretation based on the remainder of the bill I believe it preferable to delete reference to the state from this section.

Lastly, may clients object to the provision for federal court de novo review (sec. 9(d). This provision does give tribal courts initial jurisdiction but renders this jurisdiction meaningless since federal review need have no reference to any prior hearing in tribal court. In effect, under the terms of this provision, the only hearing with any real meaning will occur in federal court.

Several Federal district and circuit court decisions have upheld tribal court jurisdiction over non-indians who conduct business on reservations. Recently, the Ninth Circuit issued a decision involving the Crow Tribe which held the tribal courts are the courts of primary jurisdiction in civil cases involving non-Indians. (See National Farmers' Union Ins. Companies v. Crow Tribe, slip opinion, decided July 3, 1984.)

The de novo review provision would run contrary to these decisions. I have two alternative suggestions. First, say nothing at all about where jurisdiction lay. Let the courts decide.

If this is unacceptable then let the Federal court first be bound by the tribal court record unless it is clear that the tribal court record cannot be cured by a remand. Only after establishment of the incompetence of the tribal court record would the District Court hold a de novo hearing. Such a provision would protect the coal companies while preserving tribal sovereignty within its boundaries. As you may know, the coal owning tribes are meeting on August 1, 1984, to discuss the bill. I am sure that a full explanation of the tribal position can be offered after that meeting but I did want to express the above points to you as soon as possible.

I trust that these comments are taken in the constructive spirit in which they are offered.

Sincerely,

Henry J. Sockbeson

HJS/mb

Addenda to Crow
Testimony

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED
JUN 30 1983
CLERK, U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

STATE OF MONTANA,)
Plaintiff)
v.)
JAMES G. WATT, Secretary of the Department of the Interior, et al.,)
Defendants)
and)
CROW TRIBE OF INDIANS,)
Intervenor)

CA 82-2421

MEMORANDUM OPINION

Subchapter IV of the Surface Mining Control and Reclamation Act of 1977 (the Act), 30 U.S.C. § 1231 et seq., was enacted for the purpose of establishing a fund for reclamation and restoration of land adversely affected by past coal mining. This action challenges a regulation promulgated by the Office of Surface Mining Reclamation and Enforcement, United States Department of the Interior (OSM), to implement the "Allocation of Funds" provisions of the Act, 30 U.S.C. § 1232(g).

Section 1232(g) of the Act provides, in pertinent part:

> (1) The geographic allocation of expenditures from the fund shall reflect both the area from which the revenue was derived as well as the national program needs for the funds.
>
> (2) Fifty percentum of the funds collected annually in any State or Indian reservation shall be allocated to that State or Indian reservation by the Secretary pursuant to any approved abandoned mine reclamation program to accomplish the purposes of this subchapter. ... (emphasis added)

30 U.S.C. § 1232(g)(1), (2). The disputed portion of the

regulation replaced the term "Indian reservation" with "Indian lands." 30 C.F.R. § 872.11(b)(3). [1/]

While only "Indian lands" is defined in the Act, [2/] it is not disputed that this term is broader than "Indian reservation." Intervenor, Crow Tribe of Indians, asserts that this substitution was made "to make this section 'more consistent with other provisions of the Act' and to provide 'a more identifiable geographical area upon which to base its allocations.'" Memorandum of Crow Tribe of Indians at 5, quoting 43 Fed. Reg. 49,933. The preamble to the regulations states that the change was made "as a result of a memorandum from the Associate Solicitor, Division of Indian Affairs in the Solicitor's Office which concluded that the legislative history required such a change." 43 Fed. Reg. 49,933.

Section 872.11(b)(3) was originally published, along with other rules implementing the Act, on October 25, 1978. 43 Fed. Reg. 49,932. On June 30, 1982 OSM revised and reprinted the regulations; however, § 872.11(b)(3) was not changed. 47 Fed. Reg. 28,574.

[1/] Section 872.11(b)(3) provides, in pertinent part:

> An amount equal to 40 percent of the reclamation fees collected from Indian lands shall be allocated to the Indian tribe having an interest in those lands at the end of the fiscal year in which they are collected for use by that tribe under an approved Indian reclamation plan. ... (emphasis added)

[2/] "'Indian lands' means all lands, including mineral interests, within the exterior boundaries of any Federal Indian reservation, notwithstanding the issuance of any patent, and including rights-of-way, and all lands including mineral interests held in trust for or supervised by an Indian tribe." 30 U.S.C. § 1291(9).

The case is presently before the Court on cross-motions for summary judgment. Plaintiff contends that the regulation is arbitrary, capricious, and inconsistent with law, as it exceeds the authority granted to the Secretary by the plain language of the statute. The federal defendants and Crow Tribe assert that plaintiff's challenge is untimely; and assuming arguendo that it is timely, the regulation is consistent with legislative intent.

Crow Tribe also argues that the "ceded strip", the main area that Montana contends is within the definition of "Indian lands" but not included in "Indian reservation", is part of the reservation. This final issue was not raised in the pleadings and, in any event, does not need to be reached by the Court. [3/]

I. Timeliness of Plaintiff's Challenge.

Defendants contend, and plaintiff does not dispute, that plaintiff "participated in the rulemaking procedures leading to the issuance of Section 872.11(b)(3) of the regulations, in October 1978." Federal Defendants' Statement of Material Facts ¶ 9. Thus, the State of Montana had notice of the regulations in 1978, and had the opportunity to, and did challenge them at that time.

In 1981 OSM proposed revisions to regulations other than § 872.11(b)(3). At that time the Governor of the State of

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[3/] The government also suggests that this case is not ripe since until Congress takes further action none of the money can be spent. Government Memorandum at 13-14. There is little merit to this contention, and since it is not expressly raised, it will not be specifically addressed.

Montana took the opportunity to again argue that § 872.11(b)(3) is not consistent with the statute. OSM refused to change § 872.11(b)(3) and issued final rules on June 30, 1982, in which it reprinted all of the rules, including the unchanged § 872.11(b)(3). Fifty-eight days later this action was filed.

Petitions for judicial review of final rules promulgated by the Secretary of the Department of the Interior (Secretary) under the Act must be filed within sixty days from the date of issuance of the rules. 30 U.S.C. § 1276(a)(1). Plaintiff asserts that the significant date is June 30, 1982, while defendants and Crow Tribe believe October 1978 was the appropriate time for judicial review.

The general rule in this Circuit was recently stated in Natural Resources Defense Council v. Nuclear Regulatory Commission, 215 U.S.App.D.C. 32, 39-40, 666 F.2d 595, 602-603 (1981):

> [W]e have scrutinized regulations immune from direct review by reviewing the denial of a subsequent rulemaking petition which challenged the regulations on demonstrable grounds of substantive invalidity. For example, we have permitted such indirect challenges when an agency is alleged to have issued regulations which are not authorized by their parent legislation,[48] or when changed circumstances have allegedly deprived regulations of their factual foundation and have thereby brought them into conflict with such legislation. NRDC has cited no case, however, and we are not aware of any, that has allowed the foregoing authority to permit back door procedural challenges by those who had the opportunity to seek direct review of regulations but failed to do so in a timely fashion. We have previously suggested "that those who have had the opportunity to challenge general rules should not later be heard to complain of their

> invalidity on grounds fully known to them at the time of their issuance." [51] (other footnotes omitted)
>
> 48. E.g., Functional Music, Inc. v. FCC, 274 (D.C.Cir.1958), cert. denied, 361 U.S. 813, 80 S.Ct. 50, 4 L.Ed.2d 81 (1959).
>
> 51. Outward Continental N. Pac. Freight Conference v. FMC, 385 F.2d 981, 982-83 n.3 (1967); see also Pacific Coast European Conference v. FMC, 376 F.2d 785, 787-788 n.4 (1967).

See also Professional Drivers Council v. Bureau of Motor Carrier Safety, No. 81-2283, slip op. at 3 n.2, 9-10 (D.C. Cir. Apr. 26, 1983).

In Functional Music, Inc. v. F.C.C., 107 U.S.App.D.C. 34, 37, 274 F.2d at 546, the Court stated the following reason for sanctioning judicial review of the rules although the statutory period had expired:

> The rules here attacked were initially promulgated in 1955. It very well may be that they were then sufficiently final to support judicial review. No such review had been sought, however. And as to those rules, the statutory period specified for review of, or appeal from, Commission orders and decisions has now long since passed. Nevertheless, we are persuaded that judicial examination is now permissible. As applied to rules and regulations, the statutory time limit restricting judicial review of Commission action is applicable only to cut off review directly from the order promulgating a rule. It does not foreclose subsequent examination of a rule where properly brought before this court for review of further Commission action applying it. For unlike ordinary adjudicatory orders, administrative rules and regulations are capable of continuing application; limiting the right of review of the underlying rule would effectively deny many parties ultimately affected by a rule an opportunity to question its validity. (footnotes omitted).

In this case, however, plaintiff participated in the original rulemaking so it does not fit into the category of aggrieved parties envisioned by the court in Functional Music. Rather, it falls within the group of "those who have had the opportunity to challenge general rules [and] should not later be heard to complain of their invalidity on grounds fully known to them at the time of issuance." Outward Continental, 128 U.S.App.D.C. 199, 200 n.3, 385 F.2d at 982 n.3.

While the United States Court of Appeals for the D.C. Circuit has made it clear that it will ordinarily allow review of agency decisions not to amend existing regulations when the claim raises substantive questions, it is in the public interest to provide review, and the agency has compiled a record, see generally Professional Drivers Council, slip op. at 3 n.2, 9-10, and cases cited therein, the exception applicable to parties who have previously had the opportunity to challenge the rules, embodied by Natural Resources Defense Council and Outward Continental, applies to this case. The Court, therefore finds that this action is untimely.

Nevertheless, the Court will also briefly address the substantive validity of the regulation.

II. Validity of the Regulation.

The action of OSM in promulgating the regulation must be affirmed unless such action was "arbitrary, capricious, or otherwise inconsistent with law." 30 U.S.C. § 1276(a)(1). This standard of review is very narrow; it accords substantial deference to the judgment of the agency. Courts must presume that the agency action was valid, and may not substitute their judgment for that of the agency. See Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416, 91 S.Ct.

814, 823, 28 L.Ed.2d 136 (1971); Western Coal Traffic League v. United States, 219 U.S.App.D.C. 327, 339, 677 F.2d 915, 927, cert. denied, 103 S.Ct. 568 (1982); Loyola University v. F.C.C., 216 U.S.App.D.C. 403, 407, 670 F.2d 1222, 1226 (1982).

The rule in question, which modifies the statutory language "Indian reservation" to "Indian lands" in determining the proper allocation of the abandoned mine reclamation fund, was engendered by a memorandum by the Associate Solicitor, Indian Affairs. See Exhibit 2, Crow Tribe Motion for Summary Judgment. The Associate Solicitor first stated that the Act "is at best ambiguous as to whether Congress intended the words 'Indian reservation' to mean something different from the words 'Indian lands'." He noted that Indian reservation is not defined in the Act, and then cited several instances where Congress and others have "indiscriminately used" the two terms, and other similar terms, interchangeably when discussing Indian related matters. Second, the Associate Solicitor indicated a further ambiguity in the language of a proposed section of the statute which used both terms. Third, the Associate Solicitor referred to portions of the legislative history evidencing Congress' intent to mean "Indian lands": (1) Congress intended that a percentage of the fund would go to the locale where it was collected; (2) Congress supports Indian regulation of coal mining on Indian land; and (3) if the statute was construed otherwise it would likely violate the law that States have no jurisdiction to regulate Indian lands, as well as the express prescription in the statute that "nothing in this Act shall change the existing juriscitional status of Indian lands", 30 U.S.C. § 1300(h).

According to the legislative history the relevant portion of the statute first appeared during the 93rd Congress at § 401(e) of S. 425, as a result of amendments proferred by the Committee of Conference. H.R. Rep. No. 1522, 93rd Cong., 2nd Sess. (1974). While the conference report did not specifically address § 401(e), language in the report supports the argument that the regulation comports with Congressional intent. First, the report states that 50% of the fund is to be spent in the State where revenues are derived. Later, in the Indian lands section analysis the report indicates that the Indian tribes are to be treated like States in regard to the regulation of mining on Indian lands. H.R. Rept. No. 1522, 93rd Cong., 2nd Sess., 120 Cong. Rec. 38,280, 38,282 (1974).

Moreover, during the House debate following submission of the report it became clear that the purpose of the 50% provision was to return the funds to the State where the coal originated. 120 Cong. Rec. 38,599. This is consistent with the Associate Solicitor's analysis that to effectuate this purpose "Indian lands" is more appropriate than "Indian reservation."

In S. Rept. No. 128, 95th Cong., 1st Sess. 67 (1977), the Committee on Energy and Natural Resources specifically addressed the pertinent provision (then appearing at

§ 301(e)): "Fifty percent of the revenues derived from a county, school district or lands of an Indian tribe are to be returned to that county, school district or Indian tribe for use in accomplishing the purposes of this title." (emphasis added). The committee also reprinted a letter to Sen. Henry Jackson from then Secretary Cecil D. Andrus, which said:

> We also are of the view that the 50 percent share reserved for expenditure in the State or Indian lands where collected should be determined after 10 percent is allocated for hydrological studies and 20 percent for the Rural Lands Program. This would provide further funds for States having the largest amount of abandoned coal mined lands. Funds reserved to the State or Indian land where collected should be available for non-coal mine reclamation.

Id. at 113 (emphasis added).

On the other hand, during a debate in the Senate over another section of the Act, it was evident that at least the Senators involved in that discussion knew the difference between "Indian reservation" and "Indian lands." *See* 123 Cong. Rec. 15,608-15,610 (1977). The Crow Tribe's ceded strip is discussed. *Id.* at 15,609.

Plaintiff's position is also bolstered by the fact Congress rejected President Ford's recommendation to provide explicit authority for the Secretary to define ambiguous terms in the Act. *See* S. Rept No. 28, 94th Cong., 1st Sess. 185 (1975); S. Rept. No. 101, 94th Cong., 1st Sess. 87 (1975).

While there are persuasive arguments on both sides of the issue before the Court, the Court finds the defendants' and intervenor's position must prevail. "[T]he construction of a statute by those charged with its execution should be followed unless there are no compelling indications that it is wrong, especially when Congress has refused to alter the administrative construction." Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367, 381, 89 S.Ct. 1794, 1802, 23 L.Ed.2d 371 (1969)(footnotes omitted). While Congress has not addressed the regulation, the regulation has been on the books since 1978 and Congress has done nothing to change it.[4]

An appropriate Order shall issue.

Dated: June 30, 1983

JOHN GARRETT PENN
United States District Judge

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[4] Moreover, defendants point out that the fund cannot be distributed until Congress takes further action. Federal Defendants' Memorandum at 13. Thus, this issue can be submitted to Congress prior to the manifestation of any harm to plaintiff. While this fact is not sufficient for the Court to avoid the issues in this case it does mitigate plaintiff's allegation of deprivation of funds.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED
JUN 30 1983
CLERK, U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

STATE OF MONTANA,

Plaintiff

v.

JAMES G. WATT, Secretary
of the Department of the
Interior, et al.,

Defendants

and

CROW TRIBE OF INDIANS,

Intervenor

CA 82-2421

ORDER

In view of the Memorandum Opinion entered in this case on June 30, 1983, it is hereby

ORDERED that plaintiff's motion for summary judgment is denied, and it is further

ORDERED that defendants' and intervenor's motions for summary judgment are granted, and it is further

ORDERED that this case is dismissed with prejudice.

Dated: June 30, 1983

JOHN GARRETT PENN
United States District Judge

Attachment

Attachment to Crow Tribe's testimony dated 8-10-84.

United States Department of the Interior
OFFICE OF SURFACE MINING
Reclamation and Enforcement
WASHINGTON, D.C. 20240

DEC 17 1981

Mr. Ellis Knows Gun
Director
Crow Tribe's Abandoned Mine Land Program
P. O. Box #133
Crow Agency, Montana 59022

Dear Mr. Knows Gun:

In response to your letter of November 17, 1981, in which you indicated that you have been informed that OSM is still planning to change Part 888 of the AML regulations from "Indian Lands" to "Indian Reservation," let me assure you that no such change has been made. The proposed revised AML regulations which were published on December 11, 1981, refer only to "Indian Lands." In fact, the only change to Part 888 has been to correct a minor printing error. Enclosed is a copy of the proposed revised regulations (see pp. 60797-60798).

We have recently informed Mr. Donald Stewart, Sr., Chairman for Administration, Crow Tribal Council, concerning this matter.

Sincerely,

Don Willen
Chief, Abandoned Mine Land
Reclamation Division

Enclosure

ATTACHMENT C

Attachment to Crow Tribe's testimony dated 8-10-84.

United States Department of the Interior
OFFICE OF SURFACE MINING
Reclamation and Enforcement
BROOKS TOWERS
1020 15TH STREET
DENVER, COLORADO 80202

December 8, 1982

Mr. David W. Simpson
General Manager, Operations
Westmoreland Resources Inc.
Hardin, Montana 59034

Dear Mr. Simpson:

As discussed with you on November 23, 1982, OSM wishes to clarify our position with regard to the status of permitting of the Absaloka Mine. Your letter of July 12, 1982 and background information were very helpful in summarizing the history of the mine permitting. We also appreciate your time and effort in making the presentation of this background and your related concerns at the November 23rd meeting.

After review and discussions, OSM has reached the following conclusions with regard to the status of the May 24, 1982 Absaloka mine application.

- OSM considers the application area (except for the state land in section 36) to be Indian lands, as defined in Section 701(9) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), which includes "mineral interests held in trust for or supervised by an Indian tribe".

- Since OSM has determined that the Absaloka Mine lands fall within the definition of Indian lands, neither the Cooperative Agreement with the State of Montana (30 CFR 926.30) nor the Federal Lands Program (30 CFR 740) by their own terms apply to this mine. Therefore, it is the responsibility of OSM, as the regulatory authority for Indian lands, to comply with the provisions of Section 710(d) of SMCRA and the implementing regulations (25 CFR 216). Specifically, Sections 507-510 of the Act require OSM to impose permanent program permitting requirements for all existing and new leases issued for coal on Indian lands.

Attachment to Crow Tribe's testimony dated 8-10-84.

- OSM recognizes that Westmoreland Resources, Inc. has mine plan approval for the Absaloka Mine from the Secretary of the Interior under 30 CFR 211 and that the initial 20-year plan was found to be in compliance with the interim regulatory program under 30 CFR 715-716 and 25 CFR 216 (formerly 25 CFR 177). This authorization is valid within the approved area until a decision is rendered on the application now pending. The permit application and proposed modifications of May 24, 1982 for the 20-year mine plan have not been reviewed by OSM for compliance with those permanent program requirements put in force by Section 710(d) of SMCRA and 25 CFR 216.

Based upon the foregoing OSM has initiated the following actions for review of the Absaloka Mine Plan Application and modifications. OSM is currently in the process of finalizing a Memorandum of Understanding (MOU) with the Montana Department of State Lands (DSL) that will provide for a joint, cooperative review of the application. The DSL will coordinate the processing of the review and will serve as the only contact for the applicant concerning any deficiencies found. If the application is found to be in compliance with the applicable regulations, both a State permit and a Federal permit will be independently issued. Due to the potential for significant environmental impacts from mining operations, OSM has determined that a supplemental Environmental Impact Statement (EIS) will be prepared on the decision. OSM has proposed that this supplemental EIS be jointly prepared with DSL with the provision that the Federal timing requirements under NEPA will be applied.

In summary, it is OSM's position that the Absaloka mine requires a Federal permit for surface mining and reclamation operations in order to satisfy the permanent program requirements of Section 710(d) of SMCRA and 25 CFR 216. OSM intends to fully cooperate with DSL to ensure that the review of the application is conducted in a timely manner without undue hardship or delay for Westmoreland Resources, Inc.

If you have any questions concerning our determinations and position on this matter, please contact me. We look forward to your cooperation with the joint review to determine that your proposed plans are in full compliance with the requirements of SMCRA and the lease.

Sincerely,

Richard E. Dawes

for
As Actg
Allen D. Klein
Administrator
Western Technical Center

cc: George W. Miller
Gary Amestoy, DSL
Marvin Stewart, Crow Agency

ADDITIONAL TESTIMONY SUBMITTED BY THE CROW TRIBE OF INDIANS

The Crow Tribe of Indians submits this written statement to supplement its oral testimony given before this Committee on August 10, 1984. The Crow Tribe requests that this statement be included within the permanent record of proceedings on Senate Bill 2879.

I.

INTRODUCTION

Senate Bill 2879, entitled the "Indian Coal Mining Regulatory Act of 1984" will have an extremely negative impact upon the Crow Tribe of Indians and its tribal members. The Tribe will identify its general and specific objections to the Bill in this statement. First, however, it will be helpful to provide some basic background information concerning the Tribe, its coal resources, and the very unique jurisdictional issues facing the Tribe that are affected by this Bill.

The Crow Indian Reservation is located within the State of Montana.[1] The Reservation as originally set apart by the Treaty of Fort Laramie, 11 Stat. 749 (1851), and covered 38.5 million acres in the States of Montana and Wyoming. Thereafter, the Second Treaty of Fort Laramie, entered into in 1868, 15 Stat. 649, established a smaller Reservation of eight million acres entirely within the State of Montana.

Beginning in 1868, the Crow Reservation was affected by a series of land cession acts. Montana v. United States, supra,

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[1] The present day reservation is depicted on the map attached as "Exhibit 1".

450 U.S. at 548. The most significant such Act for present purposes is the Act of April 27, 1904, 33 Stat. 352 (1904 Act), which opened to settlement what has come to be called the Crow "ceded strip", an area of 1,137,500 acres, generally just north of the present reservation.[2/] This Act authorized the United States to sell these lands with the proceeds of the sales being held in trust for the Tribe's use and benefit. Soon after the Act was passed, the Supreme Court held that, until the lands covered by the Act were actually disposed of, the Crow Tribe retained a beneficial interest in them. Ash Sheep Co. v. United States, 252 U.S. 159, 165-166 (1920).

Pursuant to the 1904 Act, lands within the ceded strip were disposed of by the United States.[3/] A considerable amount of land -- both surface and mineral -- was conveyed to non-Indians. Significantly, the patents issued to non-Indians for approximately 70,000 acres of coal lands expressly excepted

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[2/] This area is shown on Exhibit 1 as an area located to the north of the reservation and its boundaries are marked on the map.

[3/] Under section five of the Act, the State of Montana received sections 16 and 36 for the support of common schools. 33 Stat. 360. Some allotments to individual Indians were made under section four. 33 Stat. 358-59. The remaining lands in the ceded area were opened to homestead entries. Under section five, lands were offered for settlement for the price of $4.00 per acre. The lands that could not be sold for this price, or more, were to be offered for sale under such presidential proclamations as were deemed necessary. Further dispositions were made under a number of presidential proclamations: May 24, 1906, 24 Stat. 3200; September 9, 1910; 36 Stat. 2742; August 9, 1912, 37 Stat. 1759; September 28, 1914, 38 Stat. 2029; and April 6, 1917, 40 Stat. 1653.

and reserved rights to the underlying minerals in favor of the United States. Thus, the Crow Tribe retained its beneficial interest in these undisposed of surface lands and reserved minerals within the ceded strip. Ash Sheep, supra.

The development of its coal is extremely important to the Crow Tribe and its members. Coal is the Tribe's primary asset and vast deposits underlie the eastern portion of the Reservation and the ceded strip. It is no exageration at all to say that development of this coal is the only realistic way for the Crow Tribe to alleviate its severe poverty and to put the Tribe on a sound economic footing.

In this regard, the Crow Tribe's mining within the ceded strip is vitally important. In fact, at present the Tribe's only coal mining is taking place in the ceded strip. This mining is being conducted by Westmoreland Resources, Inc., a non-Indian company, that entered into two leases with the Crow Tribe in 1972 to mine the tribal coal underlying about 31,000 acres of the ceded strip. To the best of our knowledge, the Westmoreland mine is the only existing mine in the country producing Indian-owned coal that is located entirely in a "ceded" or "off reservation" area.[4/]

[4/] Throughout this testimony, the Tribe will refer to the Crow "ceded strip" as an "off reservation" area. This reference should in no way be interpreted as an admission that such lands, particularly the surface mineral lands that were never sold pursuant to the 1904 Act, were not restored to the Crow Reservation by a subsequent Act of Congress.

As the Committee is no doubt aware, the Westmoreland mine in the ceded strip has generated substantial litigation involving the Crow Tribe, the United States, and the State of Montana. For purposes of this discussion, there are two significant cases. One is the "Crow Severance Tax Case," Crow Tribe of Indians v. Montana, 469 F. Supp. 154 (D. Mont. 1979), reversed and remanded, 650 F.2d 1104 (9th Cir. 1981), modified, 665 F.2d 1390 (9th Cir. 1982), cert. denied, 451 U.S. 1116 (1982). The other is the "Crow Abandoned Mine Fund Case", State of Montana v. Clark (No. 83-1982, D.C. Cir.).

The Crow Severance Tax Case is a suit that was brought by the Crow Tribe in 1978 against the State of Montana and various state officials seeking declaratory and injunctive relief against the imposition of Montana's severance and gross proceeds taxes on the production and sale of Crow coal both within the Reservation and on the ceded strip. The suit was originally dismissed by the district court for failure to state a claim upon which relief could be granted. Crow Tribe of Indians v. State of Montana, 469 F.Supp. 154 (D. Mont. 1979). On appeal, however, the Ninth Circuit reversed and remanded, holding that the Tribe had stated valid claims and indicating that the state taxes would be invalid if the Tribe could show at trial that the state taxes substantially affected its ability to offer governmental services or its ability to regulate the development of tribal resources, unless Montana could show that revenues from the taxes are needed to cover the governmental costs associated with the minig of Crow coal. Crow Tribe v. Montana, supra, 650 F.2d at 1114, 1117. The

Ninth Circuit also stated that there probably was a "fatal conflict" between the Montana severance tax and the purposes of the Indian Mineral Leasing Act of 1938, 25 U.S.C. §§396a-396g (1976). Crow Tribe v. Montana, supra, 650 F.2d at 1114. The Supreme Court denied Montana's Petition for Certiorari. 451 U.S. 1116 (1982).

The case is now on remand before Judge Battin in federal district court. The United States has intervened on the Tribe's behalf. In January of 1984, a two and one-half week trial was held after which all of the parties filed lengthy briefs and the case was argued to Judge Battin and taken under submission by him on July 30, 1984.

The other significant litigation, the Crow Abandoned Mine Fund case, is a suit that was brought by the State of Montana in 1982 against the Secretary of the Interior to challenge the existing federal regulation, 30 C.F.R. §872.11(b)(3), that allocate abandoned mine reclamation fees collected from all "Indian lands" to the Indian Tribe that exercises jurisdiction over such lands. Pursuant to this regulation, the Crow Tribe has been allocated over $4.1 million in fees from the Westmoreland Mine in the ceded strip.[5/] The Crow Tribe intervened in that suit in order to protect is vital interest in those funds.

[5/] Counsel for the Tribe determined that this amount has been allocated based upon a recent telephone conversation with the Office of Surface Mining Regional Office in Casper, Wyoming.

On July 30, 1983, the U.S. District Court for the District of Columbia issued its decision in favor of the Secretary of the Interior and the Crow Tribe. The district court held that Montana's suit should be dismissed on the grounds that it was filed too late. In this regard, the court noted that the challenged regulation had been promulgated more than four years ago in 1978 and that the applicable statute of limitations required the suit to be brought within 60 days of the issuance of the regulation. In addition, the court ruled in the alternative that the federal regulations were valid. The court found that allocation to Indian Tribes of fees from all "Indian lands" was consistent with Congress' intent in enacting the Surface Mining Control and Reclamation Act of 1977 (hereinafter "SMCRA").[6/] Montana has appealed this decision to the United States Court of Appeals for the District of Columbia and oral argument is scheduled for September 25, 1984.

II.

DISCUSSION

With this background information in mind, the Crow Tribe will now identify its general and specific objections to S. 2879. For organizational purposes, the Tribe's objections break down into two categories. The first category deals with provisions of

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[6/] One argument of the Tribe's not addressed by the court was that the minerals underlying the ceded strip were restored to Indian reservation status by a subsequent Act of Congress. *See*, footnote 4, *supra*.

the Bill that will adversely affect the Crow ceded strip as an "off-reservation" area. See pp. 7-22, infra. The second category deal with the Tribe's objections to general provisions of the Bill. See pp. 22-27, infra. Included in this discussion are specific amendments proposed by the Tribe to alleviate its concerns.

A. Provisions Affecting the Ceded Strip

The Crow Tribe's most fundamental objections to S. 2879 concern the impact the Bill will have upon the Crow "ceded strip." As indicated above, the Crow Tribe stands in a unique situation in that it depends upon an existing mine in an off-reservation "ceded" area and, in addition, owns billions of tons of coal within the ceded area that is not subject to existing leases or agreements. Moreover, the very issue of allocation of reclamation fees within the Crow ceded strip is currently being litigated by the Crow Tribe in a case involving the State of Montana and the federal government. The question of regulatory authority over surface reclamation activities within the ceded area has also been raised, and discussed and debated in the severance tax litigation. For these reasons, the Tribe is opposed in general to S. 2879 as presently drafted since it attempts to legislate a solution to the complex issues surrounding the Crow ceded strip in a general and simplistic fashion without any regard to the unique status of the area or the litigation surrounding it. In addition, by subjecting the Tribe's dominant mineral interest to the State's comprehensive regulatory authority, S. 2879 reverses the existing legal relationship between the two sovereigns.

As such, the Tribe recommends and strongly urges this Committee to adopt an amendment to the Bill that would expressly immunize the Crow ceded strip from any of the provisions of the Bill. Such an amendment would read:

> Nothing in this Act is intended to affect in any manner the mining of coal within the area commonly referred to as the Crow ceded strip that was opened to homesteading under the Act of April 27, 1904, 33 Stat. 352.

Inclusion of this provision will permit the unique issues of the Crow ceded strip to be resolved in the pending federal litigation where such matters should properly be determined. Congress should not apply a general piece of legislation, such as S. 2879 to a very local matter such as the Crow ceded strip dispute which is already being resolved in on-going federal litigation between the Tribe, the State of Montana and the federal government.

Apart from these general objections, the Crow Tribe will now identify its specific objections and comments to those provisions of the Bill that affect the Crow ceded strip. The primary sections of the Bill that are objectionable in this regard are Section Five, establishing the Tribal Abandoned Mine Reclamation Fund, and Sections Four and Six authorizing State and Tribal Regulatory Programs.

Section Five

Section Five of S.2879 stands out one of the most unjustified and objectionable provisions of the proposed legislation. This section: (1) completely alters existing law under SMCRA without any rational basis; (2) would deprive the Crow Tribe of over $4.1 million that has already been collected for the Tribe's use and benefit; and (3) would completely eliminate the Crow Tribe's only existing source of reclamation fees.

Section Five of S. 2879 completely alters existing federal law with respect to the allocation of reclamation fees between States and Indian Tribes. Under current law, Tribes receive reclamation fees of 17¼¢ per ton from coal mining generated from all "Indian lands" whether or not such lands are located within the exterior boundaries of an Indian reservation. This is authorized by Section 1232(g)(2) of SMCRA and federal regulations that were promulgated pursuant to the Act in 1978. The regulations implement the statute and provide that,

> (3) An amount equal to 50 percent of the reclamation fees collected from Indian lands shall be allocated to the Indian tribe having an interest in those lands at the end of the fiscal year in which they are collected for use by that tribe under an approved Indian reclamation plan...

30 C.F.R. 872.11(b)(3). The term "Indian lands" is defined under SMCRA as "all lands, including mineral interests, within the exterior boundaries of any Federal Indian reservation... and all lands including mineral interests held in trust for or supervised by an Indian tribe." 30 U.S.C. §1291(9). Thus, under existing law tribes may collect fees from all trust mineral lands without regard to reservation boundaries. As indicated above, the validity of this regulation has been sustained by the U.S. District Court for the District of Columbia in pending

litigation.

Section Five of the Bill would effectively reverse the federal district court's decision and completely alter the allocation scheme established under existing regulations. It would establish a "Tribal Abandoned Mine Reclamation Fund" ("Tribal Fund") under which all of the reclamation fee monies collected to date from state and Indian lands would be allocated. The Tribal Fund under the Bill would consist of:

> (A) Fifty per centum of amounts deposited pursuant to section 401(b) of the Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. 1231(b)) which were generated by mining activities _within the exterior boundaries of Indian reservations_ prior to the date of enactment of this Act, and
>
> (B) Fifty per centum of funds hereinafter collected from mining activity on such lands pursuant to section 401(b) of such Act.

Section 5(a)(2)(A) and (B). (Emphasis added).

The Tribal Fund is limited to fees generated from mining "within the exterior boundaries of Indian Reservations." No provision is made for allocation of reclamation fees that have been collected in the past or that will be collected in the future from Indian trust lands lying outside of the exterior boundaries of an Indian Reservation. ("Indian lands" under SMCRA §1291(a)). Without such a provision, these funds would be allocated to the states. _See_, 30 U.S.C. §1232(g)(2). This directly reverses the existing regulations which authorize tribes to collect fees from all "Indian lands".

This change in existing law will take from the Crow Tribe over $4.1 million in reclamation fees which the federal government has collected for the Tribe and is being held in an escrow account that is earmarked for the Tribe once it obtains an approved reclamation program. This $4.1 million is the Crow Tribe's 50% share of reclamation fees that have been collected from Westmoreland Resources since 1976. Under the existing regulations, 30 C.F.R. §872.11(b)(3), the United States has allocated this money to the Tribe because the Tribe's coal within the ceded strip is included within the definition of "Indian lands" under SMCRA. Under Section Five of S. 2879, this money would be lost to the Tribe.

In our opinion, this would constitute a taking of the Tribe's property under the Fifth Amendment of the United States Constitution for which the United States would be liable to pay just compensation to the Tribe. Such a compensable taking occurs where the government appropriates a property interest for a public use without payment of just compensation. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 67 L.Ed. 322 (1922).

In this instance, it is clear that the Crow Tribe possesses the requisite property interest to invoke this protection. The federal regulation enacted in 1978 expressly allocates 50% of all reclamation fees collected from Indian lands to the Indian tribe having an interest in those lands. The regulation could not be any clearer in transferring these monies to the tribe:

> (3) An amount equal to 50 percent of the reclamation fees collected from Indian lands shall be allocated to the Indian tribe having an interest in those lands at the end of the fiscal year in which they are collected for use by that

tribe under an approved Indian reclamation plan...
30 C.F.R. §872.11(b)(3) (emphasis added). This transfer of this money to the State pursuant to S. 2879 is thus a clear confiscation of monies that have actually been allocated and earmarked for the use and benefit of the Crow Tribe. Unlike the situation presented in United States v. Jim, 409 U.S. 80 (1972), where the beneficiaries of Navajo tribal funds were shifted from are relatively small class of Navajos to a much larger group of Navajos, S. 2879 would simply take an existing fund from the Crow Tribe and give it to Montana.

To prevent this taking, and to prevent the litigation that would very likely result, the Crow Tribe recommends that the Bill be amended to keep intact the existing SMCRA allocation provisions. The exact language of this amendment is set forth at p. 14, *infra*, with other proposed amendments to Section 5(a).

In addition to constituting a "taking", in all probability Section Five would completely eliminate the Tribe's only existing source of abandoned mine reclamation revenue. As indicated previously, the only Crow owned coal that is currently being mined is from the ceded strip. Consequently, without the revenue from the reclamation fees derived from he mining of this coal, the Crow Tribe would be unable to reclaim any of the abandoned mines within its Reservation.7/

7/While Section 5(a)(2) limits the allocation of reclamation fees to the Tribe to funds generated within the Reservation, Section 5(c)(1) requires Indian tribes to use the reclamation fees that they obtained to reclaim all "Indian lands" which, according to the Bill's definition, (continued on next page)

The elimination of this source of reclamation fees makes even less sense in the case of the Crow Tribe since the State of Montana has not demonstrated a need for any additional funds. Based upon examination of OSM records, Montana has be allocated $26.1 million in reclamation fees between 1976 and 1983 from coal mines within the State other than the Westmoreland mine. Yet, it has been received actual grants (based upon a sharing of need) of only $18.5 million over that same period. In light of these figures, there is certainly no justification for transferring an additional substantial sum, in excess of $4 million, to the State when the State has not demonstrated that it can make the intended use of its existing allocation. Yet, if these funds are taken away from the Crow Tribe, the Tribe will not have any funds with which to reclaim the abandoned mines within its Reservation.

Amended Section Five

The Crow Tribe would prefer that the Crow ceded strip be entirely excluded from the provisions of S. 2879 for the reasons previously stated. In the alternative, it recommends and strongly urges the Committee to amend Section Five of the Bill so that the Tribe's prior and continuing right to receive abandoned mine reclamation fees from the ceded strip will not be affected. The new Section would be modified to read as follows: (The

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7/ (continued)
includes all off-reservation tribal mineral lands as well as reservation lands. This is doubly unfair since under the Bill, states would receive reclamation fees derived from mining in off-Reservation areas, yet tribes would be required to reclaim these same areas.

underlined provisions are our proposed additions.)

TRIBAL ABANDONED MINE RECLAMATION FUND

> Sec. 5(a)(1) There is hereby created within the Treasury of the United States a trust fund to be known as the Tribal Abandoned Mine Reclamation Fund (hereinafter referred to as the "Tribal Fund") which shall be administered by the Secretary of the Interior. The Tribal Fund shall be administered separately from, and without regard to, the Abandoned Mine Reclamation Fund created under the Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. 1231).
>
> (2) The Tribal Fund shall consist of -
>
> (A) Fifty per centum of amounts deposited pursuant to section 401(b) of the Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. 1231(b)) which were generated by mining activities on Indian lands prior to the effective date of this Act; and
>
> (B) Fifty per centum of funds hereinafter collected from mining activity on Indian lands pursuant to section 401(b) of such Act.
>
> (3) The balance of funds referred to in paragraph (2) may be expended in any State or to any Indian tribe at the discretion of the Secretary in order to meet the purposes of this Act and title IV of the surface Mining Control and Reclamation Act of 1977. Such funds may be expended directly by the Secretary or by making additional grants to approved State reclamation programs pursuant to section 405 of the Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. 1235) or to approved tribal regulatory programs pursuant to section 5 of this Act when the Secretary finds that such programs are the best means of accomplishing the specific reclamation projects. The Secretary shall consult and coordinate with the respective States or tribes those projects funded directly or in conjunction with other Federal agencies.

This amendment would maintain existing law under SMCRA by allocating 50% of reclamation fees generated from all Indian lands to the affected Tribe. The Crow Tribe would not have any objection to a further amendment which would provide that in the unique case of off-reservation Indian lands. The other 50% of the reclamation fee shall be allocated to the affected state rather than to the federal government.

Sections Four and Six

As previously indicated, the Crow Tribe also is fundamentally opposed to portions of Sections Four and Six of S. 2879 which establish "Tribal Regulatory Programs." Specifically, Section 4(a) provides that "Indian lands outside the exterior boundaries of any Federal Indian reservation shall be subject to the provisions of title IV and title V of the Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. 1231-1279) that apply to non-Federal lands." Section 6(a)(1) provides that "if surface coal mining operations are or may be conducted within the exterior boundaries of the reservation of any Indian tribe, such Indian tribe may submit to the Secretary a tribal regulatory program." These provisions purposely exclude granting any regulatory authority to Tribes over Indian lands outside the boundaries of an Indian reservation.

These provisions are unwarranted, especially in the unique case of the Crow Tribe. As indicated, the Crow Tribe holds beneficial title to a considerable portion of the underlying mineral estate in the ceded strip. Indeed, most of the only coal development taking place in the ceded area is by the Tribe's lessee.[8] In light of this situation, it makes no sense to vest regulatory authority over this area in the State of Montana instead of the Tribe.

This allocation of regulatory authority is not supported by any existing law. In the first place, it entirely subordinates the Crow Tribe's dominant interest in the ceded strip mineral estate to the inferior interests of the overlying surface owners. This violates well-settled common law principles. Under the common law, it is established that when the ownership of surface lands is separated from the ownership of their underlying mineral estate, the mineral estate is the dominant interest. Hunt Oil Co. v. Kerbaugh, 283 N.W.2d 131, 135 (N.D. 1979); Ball v. Dillard, 602 S.W.2d 521, 523 (Tex. 1980); Ottis v. Haas, 569 S.W.2d 508 (Tex. 1978); 4 Summers, Oil & Gas §652; 58 C.J.S. Mines and Minerals §159b. The owner of the mineral estate possesses the right to enter upon the subservient surface estate in order to explore for minerals, extract the minerals and use the surface for all necessary and reasonable operations in connection with the extraction and development of the minerals. This principle is illustrated in Hunt Oil Co., supra, where the owners of the mineral estate sought and obtained injunctive relief to prevent the surface owners from interfering with geophysical explorations on the property. The court in that case stated:

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[8] A small portion of the Westmoreland mine is located on mineral lands under lease from the state. Between 1974 and 1982, production of the state coal amounted to only 10% of Westmoreland's total output.

> The mineral estate is dominant in that the law implies, where it is not granted, a legitimate area within which mineral ownership of necessity carries with it inherent surface rights to find and develop the minerals, which rights must and do involve the surface estate. Without such rights the mineral estate would be meaningless and worthless. Thus, the surface estate is servient in the sense it is charged with the servitude for those essential rights of the mineral estate.

Id. at p. 135. By contrast, the surface owner may utilize the surface only to the extent that the use does not interfere with the operations of the owner of the mineral estate. See the authorities cited above.

S. 2879 reverses this legal relationship by granting states the authority to regulate mining operations in off-reservation areas such as the Crow ceded strip where the Tribe owns the dominant mineral interest. Logic and the law dictate that the Tribe as owner of the dominant estate should have the right to regulate mining operations. The Tribe's dominant mineral interest should not be made subject to regulatory requirements imposed by the State for the benefit of non-Indian owners of the surface estate.

In addition, the Crow Tribe's right to regulate its lessee in this area is authorized by existing federal case law. Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982); Montana v. United States, 450 U.S. 544, 564-65 (1981); Babbit Ford, Inc. v. Navajo Indian Tribe, 710 F.2d 587, 592-93 (9th Cir. 1983), cert. denied, ___ U.S. ___; Confederate Salish and Kootenai Tribes v. Namen, 665 F.2d 951 (9th Cir. 1982), cert. denied, ___ U.S. ___. These authorities make it clear that a tribe may regulate the activities of non-members such as coal operators who enter into contracts or leases with a tribe. Significantly in Merrion, the U.S. Supreme Court held that a Tribe possesses authority to impose its severance tax upon a non-Indian company based upon a territorial component (entering tribal lands) and because the non-Indian company is conducting business with the Tribe. Consequently, these authorities sanction the Tribe's regulation of a coal operator who is mining tribal coal since it involves a business transaction with the Tribe, even though the activity technically may be taking place in an off-reservation area. Existing law certainly would not permit states to regulate tribal mineral resources in a manner which disrupts or disarranges, or perhaps even entirely nullifies, the Tribe's program providing for the economic development of its people.

The Crow Tribe's concerns over granting this jurisdiction to Montana are not abstract. In the first place, Montana's surface mine reclamation standards are the most severe and stringent in the nation. They are much more strict than the comparable provisions of federal law. For example, MCA §82-4-228 prohibits any mining at all in so-called "critical special or unique" areas. There is no comparable provision under federal law and this provision could be used by Montana to prevent the mining of Crow coal even through applicable federal regulations would permit mining operations under what are deemed adequate protections for the environment. Section 82-2-228 is particularly objectionable in this respect due to of the lack of any definition of what might constitute a critical, special or unique area. Under this provision, Montana could selectively deny permits for almost any proposed mining operation, and it is unlikely that any court would reverse an administrative factual finding that a particular area is "critical, special or unique."

A further concern in this regard is the possibility that the State of Montana might choose to retaliate against the Crow Tribe if the Tribe is successful in its severance tax suit. Relations between the two sovereigns is not and historically has not been good. Those relations easily could get much worse in the future. If the Tribe prevails in its severance tax suit, the State and/or Big Horn County would be deprived of the very substantial tax revenues that they have been receiving from the Westmoreland Mine and might, in addition, be liable for more than $90 million to the Crow Tribe for the taxes that were wrongfully imposed and collected from 1976 through 1982. Furthermore, if the Tribe is successful in invalidating Montana's taxes, there is a strong likelihood that the Tribe will impose much lower taxes than Montana's so that Crow coal would be better able to compete with the coal that is being produced in Wyoming and is subject to much lower taxes than Montana's.

Under these circumstances, the already existing tensions between the Crow Tribe and Montana would be increased enormously and the State might "retaliate" by selectively enforcing its very tough, rigorous and highly discretionary environmental laws against mine operations in the ceded strip. The enforcement of these regulations could, as previously indicated, preclude the mining of the Crow Tribe's valuable coal deposits.

The Crow Tribe supports the application and enforcement of adequate safeguards to prevent permanent and serious injury to the surface lands disturbed by coal strip mining operations. As noted below, it also supports provisions which will insure protection of the legitimate rights and interests of surface land owners. But S. 2879 goes much too far, the Crow Tribe would accept the application to tribal minerals located in off-reservation areas of the standards developed by the Office of Surface mining which apply to federal lands located in states which do not have federally approved enforcement programs. See, generall, 30 C.F.R. Pts. 701, 740, 760-762, 769, 770-788 (1983). It cannot and will not accept a blanket delegation of authority to the State that will subject the development of the Crow Tribe's coal to the State's unlimited power to prevent the mining of Crow coal and unfettered discretion to deny access to the Tribe's minerals selectively.

Amended Sections Four and Six

As with Section Five, the Crow Tribe would prefer that the ceded strip be completely excluded from the application of the Bill. However, as an alternative the Tribe recommends that sections four and six be amended to provide that Indian tribes shall possess regulatory authority over all Indian lands regardless of whether they are located within or without the exterior boundaries of an Indian Reservations. As such, Section Four of the Bill should be deleted in its entirety since there is need to distinguish between reservation and off-reservation authority. Section 6(a)(1) would be amended to read:

> SEC. 6.(a)(1) If surface coal mining operations are or may be conducted on Indian lands of any Indian tribe, such Indian tribe may submit to the Secretary a tribal regulatory program.

This amendment correctly deletes the reference to lands "within the exterior boundaries of the reservation" and replaces it with the phrase "on Indian lands" to reflect the tribe's regulatory authority over such lands.

Severance Tax Provision

This discussion of the regulatory provisions of the Bill, raises a related issue that should be clarified. This concerns the potential affect the bill may have upon the Crow Severance Tax Case discussed earlier, Crow Tribe of Indians v. Montana, supra.

During the course of this litigation, reference has been made to a possible connection between the authority to impose severance taxes and jurisdiction to regulate the reclamation of surface acreage that is disturbed by Westmoreland's strip-mining operations. The Tribe believes that it is not the intent of the Committee or of the sponsors of S. 2879 to affect the severance tax litigation, but it must be certain that this Bill does not have such an unintended result. Consequently, the Crow Tribe proposes an amendment to the Bill which would clearly state that nothing in the Act is intended to have such an effect. This amendment would read as follows:

> Provided that nothing in this Act is intended to

> affect in any manner the authority of any Indian Tribe or State to impose or collect severance or any other taxes on the production or sale of any coal that is beneficially owned by an Indian tribe.

Such a provision would remove any doubt concerning the effect of this Bill upon the pending severance tax litigation.

B. Objections to General Provision of the Bill.

Apart from the unique problems related to the Westmoreland mine and the Crow ceded strip, the Crow Tribe also objects to a number of the general provisions of S. 2879. These objections relate primarily to the provisions of Sections Seven, Eight and Thirteen. In addition, the Tribe objects to the omission from the Bill of a provision to compensate Tribes for loss of alluvial valley floor lands.

Section Seven

Section Seven of the Bill is entitled "Federal Indian Lands Programs." This section governs the regulation of "Indian lands" where an Indian Tribe has elected not to assume full regulatory authority.9/ For such lands, the regulations that are to be applied "shall, at a minimum, be consistent with and in accordance with an approved State or Federal permanent lands program for the State in which the Indian lands are located."

9/ The use of the phrase "Indian lands" in this section is confusing. Throughout other sections of the Bill, Tribes are prohibited from regulating all "Indian lands" and are limited to regulation of lands within the exterior boundaries of an Indian Reservation. Yet this section appears to be inconsistent with the rest of the bill in that it provides for tribal regulation of all Indian lands which by definition includes off-reservation areas.

Section 7(a). Where the State and a Tribe enter into a cooperative agreement to regulate lands outside the exterior boundaries of a reservation, "the most stringent environmental protection standards of the State, or States, or Indian tribe" would apply. Section 7(c)(2).

The Tribe is opposed to enactment of these provisions. As stated above with respect to Sections Four and Six, these provisions effectively subordinate the Tribe's predominant ownership of its minerals to the interest of the surface owners. Yet, as discussed above, it is clear that the Tribe's ownership of the mineral estate is paramount and cannot be subordinated to the interests of the surface owners or the state.

These provisions also would enable states to prevent tribes from gaining access to and developing their own minerals. This is particularly objectionable in that it makes the application of state standards mandatory even with respect to Indian owned minerals within the boundaries of Indian reservations, which have historically and traditionally been subject to the exclusive jurisdiction of Indian tribes and the federal government. New Mexico v. Mescalero Apache Tribe, ___ U.S. ____, 103 S.Ct. 2378, 76 L.Ed.2d 611 (1983); Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982); Montana v. United States, 450 U.S. 544 (1981).

Amended Section Seven

Section Seven is a necessary provision in the Bill in that a federal Indian lands program must be established when a Tribe elects not to establish its own full regulatory program.

However, as stated, such a program must not incorporate or adopt state regulatory standards. In keeping with other proposed amendments, Section seven should also apply to all Indian lands and not distinguish between on and off reservation areas. To remedy these defects, the section should be amended by completely deleting the final sentence of Section 7(a). In addition, Section 7(c)(2) should be changed to read as follows:

> 7(c)(2) In any case where a mining operation extends beyond the exterior boundary of an Indian reservation, an Indian tribe may enter into a cooperative agreement with the State or States in which the operation is also located to provide for joint tribal and state participation in the regulation of surface coal mining and reclamation operations.

This amendment provides for greater flexibility for tribes and states to negotiate cooperative agreements that are tailored to the unique aspects of any particular situation.

Section Eight

The most objectionable provision of S. 2879 is Section Eight which deals with the rights of surface owners. This section is totally unsatisfactory in that it eliminates the presently existing exemption for Indian lands under SMCRA, Section 714(f), 30 U.S.C. §1304(f). Under current law, the Secretary of the Interior is prohibited from entering into any lease of federal coal deposits "until the surface owner has given written consent to enter and commence surface mining operations." 30 U.S.C. §1304(c). This provision effectively gives a surface owner veto power over the development of the coal underlying his or her property. However, §1304(f) states that the section "does not apply to Indian lands."

Section Eight of S. 2879 would eliminate this exemption. It provides that notwithstanding the exemption in Subsection (f) of 30 U.S.C. §1304, Subsections (c), (e) and (g) of 30 U.S.C. §1304 shall apply to Indian lands. This provision would be very detrimental to the interests of all tribes that own substantial coal reserves where the surface estate is severed by effectively depriving Indian tribes of their rights to their minerals by granting effective control over the Tribe's property to the surface owners.

In our opinion this provision goes well beyond mere regulation of surface mining operations and clearly constitutes a taking of tribal property for which the United States would be required to pay just compensation under the Fifth Amendment to the United States Constitution. 30 U.S.C. §1304 specifically applies only to coal that is owned by the United States. The coal that is owned by the Crow Tribe, however, is vested in the Tribe by treaty and is therefore protected by the Just Compensation Clause of the Fifth Amendment. Subjecting the development of that coal to the absolute control of the owners of the severed and subservient surface estate would clearly constitute a taking of the Tribe's property. See, Ruckelshaus v. Monsanto Co., ____ U.S. ____, 81 L.Ed.2d 815 (1984); Hodel v. Virginia Surface Mining and Reclamation Ass'n, Inc., 452 U.S. 264, 69 L.Ed.2d 1 (1981).

Amended Section Eight

The Tribe proposes and strongly urges the Committee to delete Section Eight in its entirety to keep intact the existing exemption for Indian lands under SMCRA section 714.

Section Thirteen

Section 13 of S. 2879 entitled "Conflict of Interests" appears to be unclear and internally inconsistent. The Crow Tribe urges that Section 13 be amended in order to clarify that membership in a tribe in and of itself will not be considered to create a conflict of interest which precludes a tribal member from participation in a tribal regulatory program. To accomplish this objective, the Crow Tribe recommends deletion of the words "except as provided in Subsection b" from Section 13(a).

Alluvial Valley Lands

One additional specific objection to the Bill concerns a matter that is not mentioned in the Bill, compensation to tribes who are precluded from mining coal located in alluvial valley floors. Under current law, SMCRA prohibits surface mining by an operator under a pre-1977 coal lease within alluvial valley floors which would interrupt, discontinue, or preclude farming or materially damage the quality or quantity of water supplied to such alluvial valley floors. 30 U.S.C. §1260(b)(5). When such a finding is made, the Secretary may enter into an agreement with the coal operator to lease or convey "other available Federal coal deposits" in exchange for the relinquishment of the federal lease or fee title to such other deposits. 30 U.S.C. §1260(b)(5). This alluvial valley provision is applicable to "Indian lands" under SMCRA. 30 U.S.C. §710(d).

These provisions provide no compensation at all to

Indian Tribes for the loss of coal development caused by federal protection of alluvial valley floors. The only protection is to the coal operator who may elect to obtain an exchange lease on federal lands. Moreover, this is only a limited protection since it applies only to pre-1977 leases where the Secretary ... determines that substantial financial and legal commitments were made by an operator prior to January 1, 1977. 30 U.S.C. §1260.

These provisions fail to recognize the need to compensate Indian tribes for loss of their valuable coal deposits. The Crow Tribe therefore recommends that the Bill be amended to provide that

> Where an Indian Tribe is precluded from authorizing the mining of coal under the provision of 30 U.S.C. §1260(b)(5) the Secretary shall transfer in trust to the Tribe title to an equivalent amount of federal coal lands within or adjacent to the Reservation. Such lands shall be treated as Indian lands and shall be transfered to an Indian Tribe notwithstanding any requirements of Section 510 of SMCRA, 30 U.S.C. §1260.

Inclusion of this provision in the Bill will afford full compensation to tribes who lose the benefit of coal development through no fault of their own due to the federal policy of affording protection to alluvial valley floor lands.

CONCLUSION

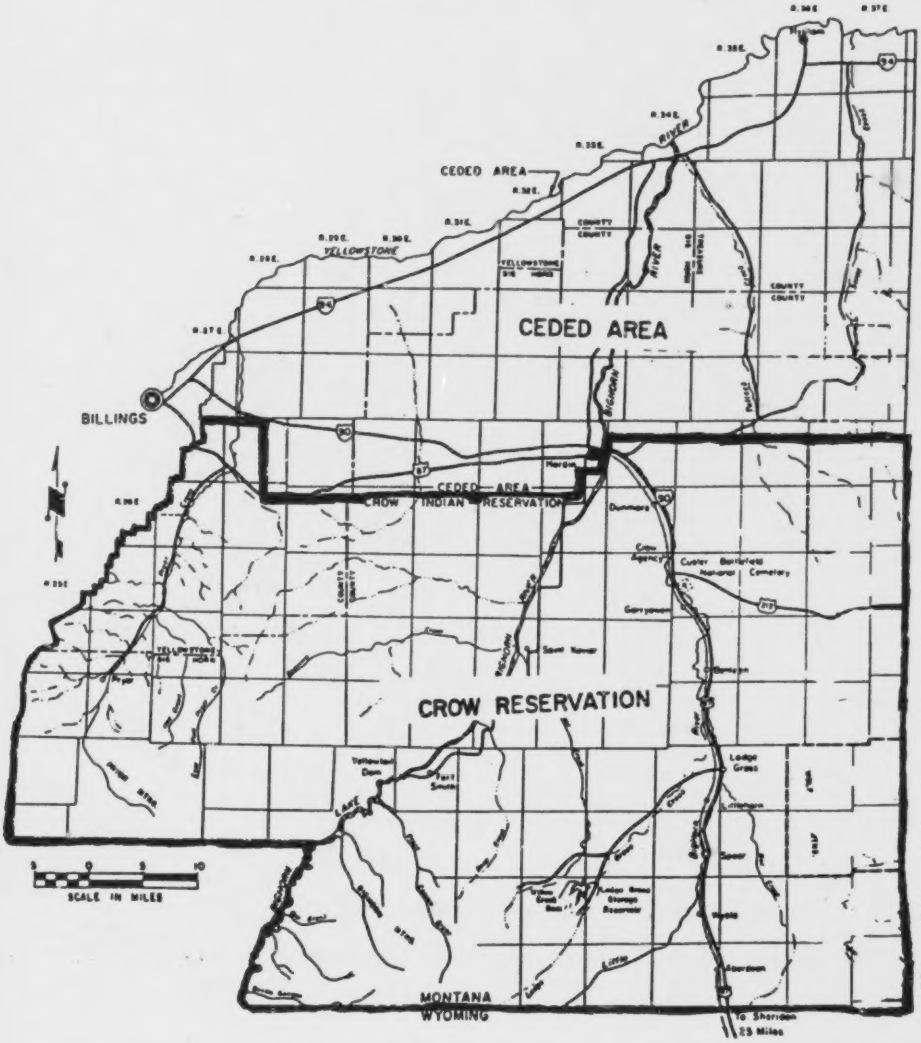
In conclusion, the Crow Tribe of Indians would like to thank the Committee for providing this opportunity to submit this written testimony to be considered as part of the record of Senate Bill 2879. This is a matter that is of the utmost concern to the Tribe and it is hoped that the Tribe's comments are considered and ultimately adopted by this Committee.

Respectfully submitted,

Donald A. Stewart, Sr.
Chairman, Crow Tribe
of Indians

Fredericks & Pelcyger
Attorneys for the
Crow Tribe of Indians

CROW RESERVATION AND CEDED AREA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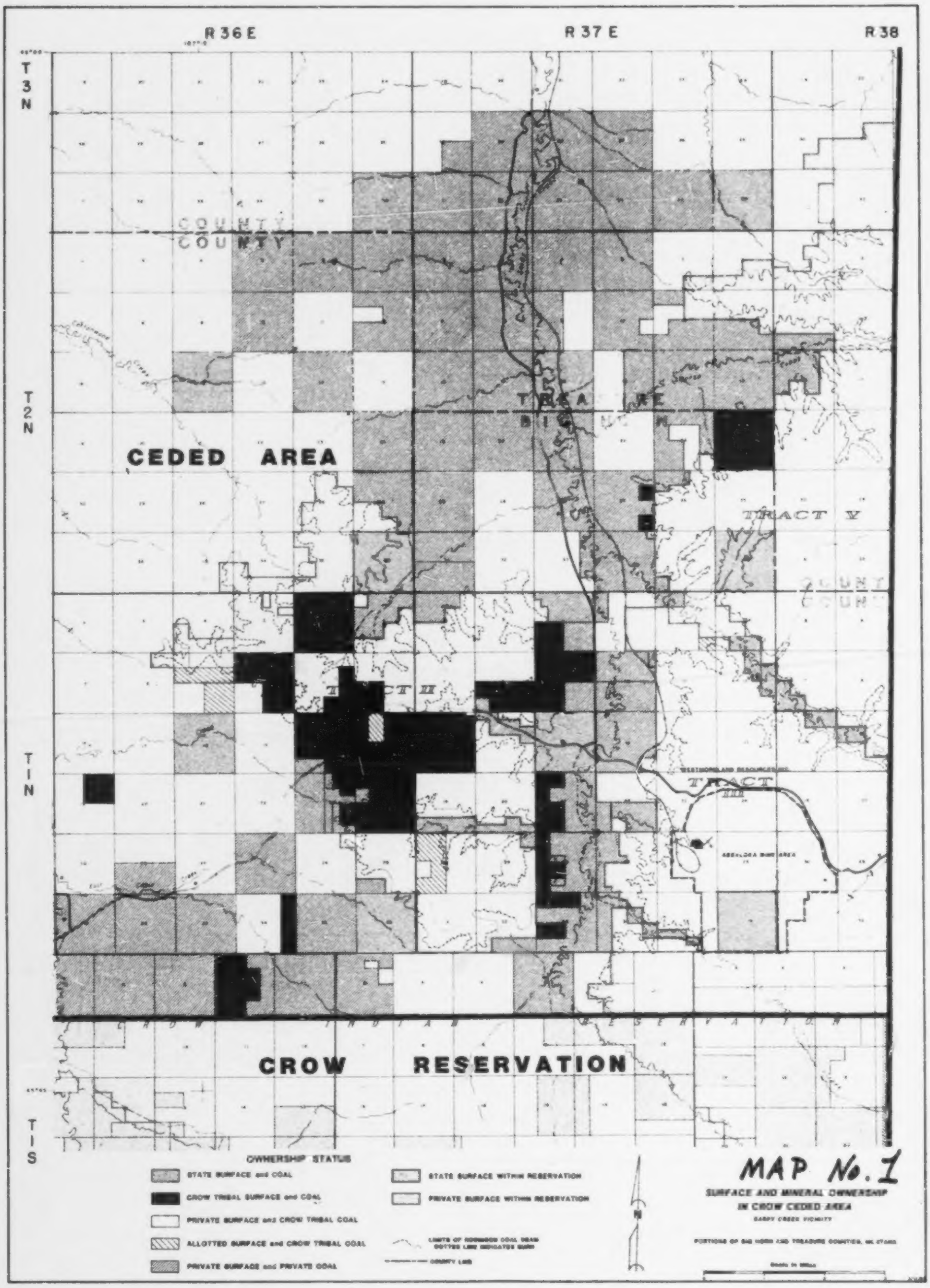
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CROW TRIBAL SURFACE and COAL
PRIVATE SURFACE and CROW TRIBAL COAL
ALLOTTED SURFACE and CROW TRIBAL COAL
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SURFACE AND MINERAL OWNERSHIP
IN CROW CEDED AREA
SARPY CREEK VICINITY
PORTIONS OF BIG HORN AND TREASURE COUNTIES, MONTANA
Scale in Miles

STATEMENT OF THOMAS FREDRICKS, ATTORNEY FOR THE CROW TRIBE

Mr. **Fredricks**. Mr. Chairman, I want to take this opportunity to also commend you for your efforts in developing S. 2879. This is a very complex area. The jurisdictional aspects of this area have been in litigation, and I think the proposed legislation is a very good document with which to work.

This committee is well aware that the Crow Tribe has significant interests in this legislation. There are vast coal reserves underlying the Crow reservation, and in the so-called ceded area adjacent to the reservation. To the best of our knowledge, the only existing mine producing Indian-owned coal that is located in an off-reservation area is the Westmoreland Mine located in the ceded area. This mine has generated a substantial amount of litigation which is extremely important to both the Crow Tribe and the State of Montana. It is no exaggeration to say that the litigation involves hundreds of millions, perhaps billions, of dollars and that the future economic viability and livelihood of the Crow Tribe and its members are inextricably linked to the outcome of this litigation and the development of the Crow Tribe's coal.

Consequently, the Crow Tribe has a very significant stake in any legislation that significantly affects the development of its coal reserves. First, as the committee is undoubtedly aware, the Crow Tribe and the State of Montana are presently involved in an extremely important and complicated litigation involving the imposition of severance tax on the sale and production of tribally owned coal, both on the reservation and within the ceded area. We, too, like the Justice Department and the Department of the Interior or the administration witnesses, would like to see something in this legislation that would amend the bill which would clearly state that nothing in the act is intended to affect in any manner the authority of any Indian tribe or State to impose or collect severance or any other taxes on the production and sale of any coal that is beneficially owned by Indian tribes.

The inclusion of this kind of provision would permit implementation of the best possible jurisdictional arrangements for regulation of surface mine activities without concern for the possible ramifications of this bill in the severance tax issue.

Second, the tribe has certain specific objections to the general provisions of the act whch I would like to discuss before dealing with some of the unique problems related to the mining of coal from the ceded area. The most significant objection relates to section 8 of S. 2879 which deals with the rights of surface owners. Section 8 is very objectionable to the Crow Tribe in that it removes the exemption for Indian lands that is provided in section 714(f) of SMCRA. Section 8 of S. 2879, by giving the surface owners a veto power over the disposition of leasing and development of tribally owned coal, goes well beyond mere regulation of surface mining operations and clearly constitutes a taking of tribal property for which the United States would be required to pay just compensation under the 5th amendment clause of the Constitution.

For these reasons, the Crow Tribe strongly opposes the inclusion of section 8 in S. 2879 and strongly urges that this provision be deleted from the bill.

Section 13 of S. 2879 appears to be unclear and internally inconsistent. The Crow Tribe urges that section 13 be amended in order to clarify that membership in a tribe, in and of itself, will not be considered to create a conflict of interest which precludes a tribal member from participating in a tribal regulatory program. To accomplish this objective, the Crow Tribe recommends deletion of the words, "except as provided in subsection (b) from section 13(a)" of S. 2879.

The Crow Tribe also objects to the provisions in section 7(a) and 7(c) of S. 2879 which provide for the application of State reclamation standards to the mining of Indian-owned coal. The provisions in section 7(a) and 7(c)(2) would enable States to prevent tribes from gaining access to developing their own minerals. Section 7(a) is particularly objectionable because it makes the application of State standards mandatory even within the boundaries of Indian reservations which have historically and traditionally been subject to the exclusive jurisdiction of Indian tribes and the Federal Government.

I would like to devote the remainder of my testimony to a discussion of the problems created insofar as the bill pertains to the tribe's minerals and actual mining within the ceded area. Let me first state that the bill was introduced on July 27, 1984 and that this hearing is taking place less than 2 weeks later. Within this time period, the tribe has not had an adequate opportunity to completely review and analyze the bill. Therefore, Senator, we would like to have the opportunity also to restate and to brief some of the legal arguments that we have submitted here today.

Senator **Melcher**. Yes, Tom, that of course is allowed and invited. We would like to have them by September 1 is the only catch. Please now be very brief in the remainder of your statement. I am leaving for Montana on a 12:45 flight and I am going to have to leave right here from this hearing shortly. One of the things I am trying to get to is the Crow Fair. I have plenty of time to catch up with that, but I do not know if I have time to catch an airplane.

Mr. **Fredricks**. With that, Senator, I will be very brief.

As you know, the tribe is involved in litigation in the ceded area. We feel that some of the problems addressed—and I am going to basically leave my statement and hopefully it will appear in the record—but one of the concerns that we have is that, of course, applying State law to the ceded area. We find that very objectionable, primarily because we are in a litigation posture in the ceded area. A lot of the feelings are running high, pro and con against the State. We feel that by allowing the strip mining to be regulated by the State, that you are changing the law as it presently exists which makes the mineral estate the dominant estate.

We feel that under certain circumstances Montana law could be used to prevent mining of Crow coal—for example, in Montana law there is a provision where no mining can take place in unique and fragile areas. There is no definition of what is a unique and fragile area. Chris basically stated that that was one of his concerns, from the company's standpoint. But one of our concerns from the mineral owners standpoint is that unique and fragile is not defined in State law, and they can prevent mining by finding that some of the lands over Crow coal are unique and fragile. We do not feel that the tribe's real estate is given due credit in this particular regulatory scheme. We feel that because of the litigation posture that we are in, undue advantage can be gained by the State of Massachusetts with the enactment of this particular legislation.

We vehemently object to your statement that Montana is regulating in the ceded area. We are unaware that Montana is regulating in the ceded area. It is the Department's position that under the definition of Indian lands in SMCRA that that comes within the authority of the Office of Surface Mining and, to our knowledge, Montana has attempted to assert jurisdiction but it has not been recognized, and we basically have agreed to disagree and never have litigated that particular issue.

With that, Senator, I will conclude my remarks. I know you are in a hurry, and I want to give the other people an opportunity to testify here today.

[The prepared statement follows:]

PREPARED STATEMENT OF THOMAS W. FREDRICKS, ATTORNEY, REPRESENTING THE CROW TRIBE OF INDIANS

On behalf of the Crow Tribe, we welcome the opportunity to present our views on Senate Bill 2879. We applaud the efforts of the Committee to attempt to resolve the complex jurisdictional issues that exist in this area of law. Senator Melcher and other Committee members are to be commended for their efforts and hard work on this proposed legislation.

This Committee is well aware that the Crow Tribe has a significant interest in this legislation. There are vast coal reserves underlying the Crow Reservation and in the so called "ceded area" adjacent to the Reservation.

To the best of our knowledge, the only existing mine producing Indian-owned coal that is located in an off-Reservation area is the Westmoreland mine located in the "ceded area". This mine has generated a substantial amount of litigation which is extremely important to both the Crow Tribe and the State of Montana. It is no exaggeration to say that the litigation involves hundreds of millions, perhaps billions of dollars and that the future economic viability and livelihood of the crow Tribe and its members are inextricably linked to the outcome of this litigation and the development of the Tribe's coal. Consequently, the Crow Tribe has a very significant stake in any legislation that significantly affects the development of its coal reserves.

The Tribe will be submitting very detailed comments on S. 2879, which we hope will be included in the record of this hearing. In the time that is available to me now, however, I'd like to briefly outline some of the Tribe's specific and serious objections to the Bill as it exists in its current form.

First, as the Committee is undoubtedly aware, the Crow Tribe and the State of Montana are presently involved in extremely important and complicated ligitation involving the imposition of severance taxes on the sale and production of tribally-owned coal, both on the Reservation and within the "ceded area". This case was originally brought in 1978 and is now back before the United States District Court in Billings, Montana following a decision of the Ninth Circuit Court of Appeals that was very favorable to the Crow Tribe. A two and one-half week trial in this case was held in January of 1984 after which all of the parties filed lengthy briefs and the case was argued to Judge Battin and taken under submission by him on July 30, 1984. From the standpoint of the Crow Tribe, it is impossible to overstate the importance of this case.

During the course of this litigation, some of the parties in the case have referred to a possible connection between the authority to impose severance taxes and jurisdiction to regulate the mine, in particular, to regulate the reclamation of surface acreage that is disturbed by the strip-mining operations. While we are certain that it is not the intent of the Committee or of the sponsors of S. 2879 to affect the severance tax litigation, however, we must be certain that this Bill does not have such a result. Consequently, the Crow Tribe proposes an amendment to the Bill which would clearly state that nothing in the Act is intended in affect in any manner the authority of any Indian Tribe or state to impose or collect severance or any other taxes on the production and sale of any coal that is beneficially owned by an Indian tribe. The inclusion of this kind of provision would permit implementation of the best possible jurisdictional arrangement for regulation of surface mine activities without concern for the possible ramifications of this Bill in the severance tax issue. If such a provision is not included in the Bill, we fear that it will be impossible to address the issues that are of principal concern in the application of the Surface Mining Control and Reclamation Act of 1977 in a realistic, practical and objective fashion.

Secondly, the Crow Tribe has certain specific objections to the general provisions of the Act which I would like to discuss before dealing with some of the unique problems related to the mining of coal from the "ceded area". The most significant objection relates to Section 8 of S. 2879, which deals with the rights of surface owners. Section 8 is very objectionable to the Crow Tribe in that it removes the exemption for Indian lands that is provided in Section 714(f) of 30 U.S.C. § 1304(f). This is detrimental to the interests of all tribes that own substantial coal reserves where the surface estate is severed. Section 8 provides that notwithstanding the exemption in Subsection (f) of 30 U.S.C. § 1304, Subsections (c), (e) and (g) of 30 U.S.C. § 1304 shall apply to Indian lands. Subsection (c) of Section 1304 provides that no coal can be leased without the written consent of the owner of the surface estate. This provision effectively gives the surface owner a veto power over the development of the Indian-owned mineral estate. The provision will thus effectively deprive Indian tribes of their rights to their minerals by granting effective control over the tribe's property to the surface owners.

30 U.S.C. § 1304 specifically applies only to coal that is owned by the United States. The coal that is owned by the Crow Tribe, however, is vested in the Tribe by treaty and is therefore protected by the Just Compensation Clause of the Fifth Amendment. See *Montana* v. *United States,* 450 U.S. 544, 547 to 48 (1981); *United States* v. *Sioux Nation of Indians,* 448 U.S. 371, 415; Note 29 (1980); and *United States* v. *Shoshone Tribe of Indians,* 304 U.S. 111, 117 to 118 (1938). Consequently, the United States would be required to pay just compensation to the Crow Tribe and any other similarly situated tribes if legislation is enacted which deprives such tribes of their vested property rights in their minerals.

Section 8 of S. 2879, by giving surface owners a veto power over the disposition and leasing and development of tribally-owned coal, goes well beyond mere regulation of surface mining operations and clearly constitutes a taking of tribal property for which the United States would be required to pay just compensation under the Fifth Amendment to the United States Constitution.

For these reasons, the Crow Tribe strongly opposes the inclusion of Section 8 in S. 2879 and strongly urges that this provision be deleted from the Bill.

Section 13 of S. 2879 appears to be unclear and internally inconsistent. The Crow Tribe urges that Section 13 be amended in order to clarify that membership in a tribe in and of itself will not be considered to create a conflict of interest which precludes a tribal member from participation in a tribal regulatory program. To accomplish this objection, the Crow Tribe recommends deletion of the words "except as provided in Subsection b" from Section 13(a) of S. 2879.

The Crow Tribe also objects to the provisions in Sections 7(a) and 7(c) of S. 2879 which provide for the application of state reclamation standards to the mining of Indian-owned coal. By subjecting the development of Indian-owned coal to the most stringent environmental protection standards that a state may choose to impose, these provisions effectively subordinate the tribe's predominant interest in its minerals to the interest of the surface owners. For reasons that will be detailed later in my testimony, the Crow Tribe strongly believes that its ownership of the mineral estate is paramount and cannot be subordinated to the interests of the surface owners or the state. Under certain circumstances, which as I will demonstrate later in the testimony, currently exist in Montana.

The provisions in Sections 7(a) and 7(c)2 would enable states to prevent tribes from gaining access to and developing their own minerals. Section 7(a) is particularly objectionable because it makes the application of state standards mandatory even within the boundaries of Indian reservations, which have historically and traditionally been subject to the exclusive jurisdiction of Indian tribes and the federal government.

I would now like to devote the remainder of my testimony to a discussion of the problems created insofar as this Bill pertains to the Crow Tribe's minerals and actual mining within the "ceded area". Let me first state that this Bill was introduced on July 27, 1984 and that this hearing is taking place less than two weeks later. Within this time period, the Tribe has not had an adequate opportunity to completely review and analyze the Bill, particularly as it relates to the very complicated problems imposed by the mining of tribal coal in the "ceded area". As I indicated, many of these problems are currently being addressed in pending litigation.

The Crow Tribe is not opposed in principal to legislation which would address and resolve some of the important jurisdictional problems created by the mining of its coal in the "ceded area". The Tribe does, however, strongly object to making the provisions of S. 2879 applicable to the Crow "ceded area". Frankly, the Tribe does not believe that there is sufficient time left in this session of Congress to work out the details of an acceptable solution to this difficult and complicated problem. Consequently, if this Bill is to go forward in this session of Congress, the Crow Tribe strongly recommends the inclusion of an amendment which would provide that nothing in the Act would affect the mining of coal within the Crow "ceded area" or related areas.

In an effort to resolve these long standing issues, the Crow Tribe is willing to sit down and discuss this problem with officials from the State of Montana; Westmoreland Resources, the company that is currently engaged in mining operations in the "ceded area", as well as with members of this Committee and other interested members of Congress, in order to work out a legislative solution. Such a solution could be contained in an amendment of this Bill that would apply only to the Crow "ceded area". The Tribe believes, however, that it is unlikely that there is sufficient time remaining in this session of the Congress to reach an agreement among the concerned parties on such a Bill, and to obtain its enactment by Congress.

One of the most fundamental objections that the Crow Tribe has to the provisions of S. 2879 as they relate to the mining of coal from the "ceded area" is to Section 5 of the Bill, which is concerned with the Abandoned Mine Reclamation Fund. This provision is a complete reversal of current law governing the allocation of reclamation fees obtained from the mining of Indian land, and is grossly unfair to the Crow Tribe. This matter is currently involved in a lawsuit in the District of Columbia in which the Crow Tribe has obtained a favorable decision from the United States District Court. The case has been fully briefed and will be argued to the United States Court of Appeals for the District of Columbia Circuit in September.

Under present law, the Crow Tribe is entitled to receive 50 percent of the funds derived from the mining of the tribally-owned minerals in the "ceded area". See 30 C.F.R. § 872. The State of Montana has challenged the validity of this regulation in the suit to which I just referred. Pursuant to that regulation, a substantial sum of money, more than $5 million, has been paid to the federal government and set aside by the government in an account that is ear-marked for the benefit of the Crow Tribe.

Section 5 of S. 2879 would completely alter the allocation scheme that currently exists under SMCRA and the applicable regulations. The Crow Tribe would be entitled to receive only the funds that are generated by mining activities within the boundaries of the Crow Reservation. All of the funds generated from Indian lands outside the Reservation boundaries would be allocated to the State. Thus, the Bill would result in depriving the Tribe of over $5 million that exists in an ear-marked fund for the benefit of the Crow Tribe and would transfer that money to the State of Montana.

In our opinion, Section 5 would clearly result in an unconstitutional taking of funds that have been collected for the benefit of the Crow Tribe prior to the effective date of any new law. We will further elaborate on our legal position in our subsequent written statement. In any event, however, the matter is currently in litigation, and regardless of the effect of the Bill on any future reclamation fees derived from the mining of off-Reservation Indian coal, fees that were paid prior to the effective date of the Bill clearly be allocated in accordance with existing law.

As I previously indicated, the position of the Crow Tribe and the Interior Department was upheld by the District Court and is now on appeal to the Court of Appeals. The District Court ruled in favor of the Crow Tribe and the Interior Department on two alternate grounds: that Montana's challenge of the applicable regulation, 30 C.F.R. § 872, is barred by the applicable statute of limitations, and that even if it were not barred, the regulation is valid. The Crow Tribe believes that the Court should be allowed to determine whether the State of Montana or the Crow Tribe is entitled to the reclamation fees derived from the mining of coal from the "ceded area" prior to the effective date of any new legislation. The Tribe therefore recommends and strongly urges the Committee to adopt an amendment to the Bill providing that nothing in the Act is intended to affect the allocation of any reclamation fees that were paid prior to its effective date.

In addition to constituting a taking of funds that are set aside and established for the benefit of the Crow Tribe, the transfer of those funds to the State of Montana could very well eliminate the Tribe's only source of reclamation revenue. The only Crow coal that has been, and is being mined is located within the "ceded area". Without the revenue from the reclamation fees derived from the mining of this coal, the Crow Tribe would not be able to reclaim any of the abandoned mines within its Reservation. By contrast, the State of Montana has obtained substantial revenues from reclamation fees derived from other coal mining operations in the State. So far, the State has collected more than $25 million in fees. There is no indication that the State of Montana has demonstrated a need for the substantial funds to which it is already entitled in order to reclaim abandoned mines within the State. There is certainly no justification therefore for transferring an additional substantial sum, in excess of $5 million, to the State when the State has not even demonstrated that it can make the intended use of its existing allocation. If these funds are taken away from the Crow Tribe, then the Tribe will not have any funds with which to reclaim the abandoned mines within the Reservation.

In addition, I also want to point out that while Section 5(a)(2) limits the allocation of reclamation fees to the Tribes to funds generated within the Reservation, Section 5(c)(1) requires Indian tribes to use the reclamation fees that they obtained to reclaim all "Indian lands" which, according to the Bill's definition, includes all Reservation areas. This is doubly unfair since under the Bill, states would receive reclamation fees derived from mining in off-Reservation areas, yet tribes would be required to reclaim these same areas.

So far as reclamation fees derived in the future from the mining of coal in the "ceded area", the Crow Tribe opposes any arrangement under which the Tribe would be deprived of the benefit of the reclamation fees to which it is entitled under existing law. If this Committee and the Congress believe that the State of Montana needs and should obtain additional reclamation fees derived from the mining of ceded strip coal, then we suggest that the Act be amended to provide that the reclamation fees derived from ceded strip coal would be split 50 percent to the Crow Tribe and 50 percent to the State of Montana. This would, in effect, mean that the State of Montana would obtain the 50 percent of the reclamation fees that are currently allocated to the federal government under SMCRA. This would be a fair compromise that would enable the Tribe to continue to obtain its only source of funds that can be used to reclaim abandoned mines within the Crow Reservation, while also providing additional revenues to the State that would recognize the State's interest in reclamation of the surface lands within the "ceded area".

Another major problem the Crow Tribe has with S. 2879 is that Indian lands outside the exterior boundaries of any federal Indian reservations are made subject to exclusive state jurisdiction. This would mean that states would have the authority to apply and to enforce all of their environmental standards concerning the mining of off-Reservation coal. The Crow Tribe simply cannot accept that solution because it would entirely subordinate the Crow Tribe's overriding interest in the mineral estate to the interest of the overlying surface owners.

It is well established that when the ownership of surface lands is separated from the ownership of their underlying mineral estate, the mineral estate is the dominant interest. The owner of the mineral estate has the right to enter upon the subservient surface estate in order to explore for minerals, extract the minerals and use the surface for all necessary and reasonable operations in connection with the extraction and development of the minerals. By contrast, the surface owner may utilize the surface only to the extent that the use does not interfere with the operations of the owner of the mineral estate. Thus, as a matter of logic and law, the sovereign entity that owns the dominant mineral estate also should have the right to regulate mining operations.

By granting states the authority to regulate mining operations in off-Reservation areas, S. 2879 reverses the established legal relationship between mineral and surface estates and effectively makes the mineral estate subservient instead of dominant. This creates enormous potential for continuing dispute and litigation, something which we are certain that the Committee and the Congress wish to avoid. I should also like to point out that even the potential for such disputes may be enough to deter prospective producers of Indian coal from making the substantial investments that are required in order to develop that coal.

The inherent conflict and tension between the mineral and surface estates that I have previously discussed is tremendously exacerbated by the existing situation involving the Crow "ceded area" in Montana. First of all, Montana's surface mine reclamation standards are the most severe and stringent in the nation. They are much more strict than the comparable provisions of federal law. For example, MCA § 82-

4-228 prohibits any mining at all in so called "fragile or unique areas." There is no comparable provision under federal law and this provision could be used by Montana to prevent the mining of Crow coal even though applicable federal regulations would permit mining operations under what are deemed adequate protections for the environment. Section 82-4-228 is particularly objectionable in this respect because of the lack of any definition of what constitutes a unique and fragile area. Under this provision, Montana could selectively deny permits for almost any proposed mining operation and it is unlikely that any court would reverse an administrative determination that a particular area is "fragile or unique."

The Crow Tribe submits that it is unwise to allow the State of Montana to regulate mining operations in the "ceded area" because of the existence of very different and, to a large extent, conflicting interests between the Crow Tribe and Montana regarding the development of "ceded area" coal both now and in the future. As I previously indicated, these different and conflicting interests have given rise to two pending lawsuits and there are a large number of other potential problems that have existed but have not yet given rise to actual litigation. Moreover, it is reasonably foreseeable that the conflicts between the Tribe and the State will increase significantly in the future.

If the District Court's decision in the Abandoned Mine Reclamation Fund case is upheld by the Court of Appeals, Montana might not derive any reclamation fees from the mining of ceded strip coal. Moreover, if the Crow Tribe is successful in its severance tax lawsuit, the State and Big Horn County would be deprived of the very substantial tax revenues that they have been receiving from the Westmoreland Mine and might, in addition, be liable for more than $90 million to the Crow Tribe for the taxes that were wrongfully imposed and collected from 1976 through 1982. Furthermore, if the Tribe is successful in invalidating Montana's taxes, there is a strong likelihood that the Tribe will impose much lower taxes than Montana's so that Crow coal would be better able to compete with the coal that is being produced in Wyoming and is subject to much lower taxes than Montana's.

Under these circumstances, the already existing tensions between the Crow Tribe and Montana would be increased enormously and the State might "retaliate" by selectively enforcing its already very tough and rigorous environmental laws against mine operations in the "ceded area". The enforcement of these regulations could, as I previously indicated, even result in the complete closure of the Westmoreland Mine. The Crow Tribe believes that it would be extremely unwise for Congress to legislate in a manner that would give the State of Montana so much more potential leverage and control over this very sensitive, delicate and extremely valuable matter.

The Crow Tribe's preferred solution, therefore, would be to vest regulatory authority in off-Reservation areas in the owner of the dominant mineral estate. If that is not acceptable, however, the Tribe would propose two alternative solutions to the unique problems proposed by the mining of the Tribe's coal within the "ceded area". In order to prevent the potential deprivation of extremely valuable tribal property rights and avoid the costs, burdens and delays that undoubtedly would be associated with continuing jurisdictional and regulatory disputes between the Tribe and Montana, the Bill should be amended to provide that the extraction of the Tribe's coal in the "ceded area" would be governed by the federal government which would apply the applicable federal standards. Alternatively, Montana could be given the authority to regulate, but it should be required to apply the federal standards that are applicable to federal lands rather than the more stringent and severe State requirements. The Tribe is certainly willing to consider reasonable compromises and recognizes that no one is likely to be completely happy with a legislative resolution. But as it currently stands, S. 2879 totally subordinates the Tribe's legitimate interests in its extremely valuable off-Reservation minerals to the interests of the surface owner and that, we submit, is neither fair nor reasonable, nor constitutional.

Finally, let me note one caveat to my testimony. I have generally tended to refer to the 1.1 million acres that is generally referred to the Crow ceded area as if were not a part of the Crow Indian Reservation. I have done this for two different reasons. First, there are some judicial decisions holding that the ceded area is not part of the Crow Reservation and second, the State of Montana has been allowed to exercise concurrent authority with the Office of Surface Mining over the Westmoreland Mine since the enactment of SMCRA in 1977. Nevertheless, the jurisdictional status of the ceded area and of the property held by the Crow Tribe within the ceded area is a very complicated legal matter which is currently involved in some of the existing litigation to which I referred. I do not think it is necessary here to bother this Committee with the details of that existing controversy. But I do wish to note that my testimony here today should not be construed in any manner as an indication that the Crow Tribe believes that the ceded area is not part of the Crow Reservation or that the property owned by the Crow Tribe within the ceded area is not a part of the Crow Reservation.

Once again, let me thank the Committee for providing the Crow Tribe with the opportunity of testifying concerning this very crucial matter.

Senator MELCHER. All right. Thank you very much, Tom and Ellis, both of you. We appreciate your very detailed comments as far as you were able to go this time, and we recognize that it is a rather short period of time. We will look forward to any additions and further observations that you have.

Thank you very much.

Our next witness is David Redhorse, director of the Navajo Energy Development Authority.

STATEMENT OF DAVID REDHORSE, DIRECTOR, NAVAJO ENERGY DEVELOPMENT AUTHORITY, ACCOMPANIED BY ERIC EBERHARDT, ASSISTANT ATTORNEY GENERAL, NAVAJO TRIBE

Mr. REDHORSE. Thank you very much, Senator. With me is Eric Eberhardt. He is the deputy attorney general for the Navajo Nation.

First, I would like to express apologies from Chairman Zah because he is engaged in the summer session of the Navajo Tribal Council, and he has committed himself to attend all the sessions that the council has. Because of that, he extends his apologies.

As you know, Chairman Zah has been personally interested in the development of this legislation. He has met with you on at least one occasion to discuss some of the contents.

My name is David Redhorse. I am with the Navajo Tribe in the area of energy development. On behalf of the Navajo Tribal Council and Chairman Peterson Zah, I want to extend to the committee the thanks of the Navajo Nation for the opportunity to testify on S. 2879. We want to express our special thanks to you, Senator, as well as Senators DeConcini and Goldwater, for sponsoring this vital legislation. You have spent a substantial amount of time devoted to the development of this bill, and we appreciate the willingness to work with our tribe.

The Navajo Nation has more than a casual interest in the subject of surface mining control and regulation. We are a major contributor to coal production in the United States. We have five major surface mining operations on our reservation. In 1982, these mines produced in excess of 21 million tons of coal. Virtually every area of New Mexico, Arizona, and southern California is dependent upon electricity generated from Navajo coal. We also possess vast untapped reserves of coal, and we intend to play a large role in the coal development now being proposed for Navajo country in the San Juan Basin of New Mexico.

Since the passage of the Surface Mining Control and Reclamation Act, many tribes have clearly expressed their views on the administration and implementation of the act to the Secretary of the Interior and in public hearings before the Congress. All the tribes have consistently expressed their strong support for Federal legislation which recognizes the tribal regulatory authority over surface mining and reclamation activities on Indian lands. The Navajo Tribe has especially worked with other Indian tribes who possess coal to develop legislation which may be amenable to both Congress and to Indian tribes. We believe that tribes possess the inherent sovereignty to regulate mining and reclamation on Indian lands.

We are here before you today because we would like to exercise such authority within the context of SMCRA and related Federal laws. Our intent is not to weaken or dilute SMCRA, rather, our intent is to insure that SMCRA is fully and properly implemented in Indian country. Due to the unique jurisdictional status of Indian lands and the Federal trust relationship, there is a need for Federal legislation to clearly define the tribal authority to regulate mining and reclamation activity on Indian lands.

Our specific comments, in essence, applaud the efforts of the Senator and we support many of the provisions. However, there are areas where we have great concerns. One concern is the jurisdiction over the off-reservation Indian lands. Pursuant to section 4(a) of S. 2879, some tribes, including the Navajo Tribe, may find themselves in the situation where their off-reservation coal reserves are subject to State regulation. It would be far more appropriate for the tribes or the Federal Government to regulate such coal.

The provisions of section 7(c)(2) for State cooperative agreements will provide an important means for resolving potential jurisdictional conflicts. However, we believe that the Congress should unequivocally direct the States and the Secretary to enter into cooperative agreements with the tribes to ensure tribal regulation of all off-reservation Indian lands. Such a directive would be entirely in keeping with both the letter and the spirit of S. 2879. We request that the committee include language in its report to this effect.

Second, tribal abandoned mine reclamations: For this, we would recommend that section 5(a)(2)(B) be amended to provide that the tribal fund consist of 100 percent of funds collected from mining activities on Indian lands pursuant to section 401(b) of SMCRA. Such an amendment would ensure that the Indian tribes would receive the funds necessary for reclamation as well as regulatory activities. In contrast to the State and Federal Governments, most tribes simply lack the financial resources needed for even the most basic governmental functions. Every dollar of Indian AML moneys should be returned to the tribes in order to promote full enforcement of SMCRA and Indian self-sufficiency. The Secretary will still enjoy a considerable voice in the use of Indian AML funds through his ability to approve or disapprove tribal regulatory programs and to administer the Federal Indian lands programs.

We are also concerned that section 5(a)(3), as presently drafted, authorizes the Secretary to use Indian AML funds for State reclamation programs. We cannot discern any need or justification for this provision of S. 2879. If section 5(a)(2)(B) is amended to provide the tribes with 100 percent of AML funds, then section (a)(3) should be deleted in its entirety from this bill. In the alternative, section (a)(3) should be amended to clearly state that the Secretary may only expend Indian AML funds on reclamation of Indian lands pursuant to the tribal and Federal programs authorized by this bill.

Section 5 should also be amended to provide the tribes their proportionate share of AML funds derived from the off-reservation Indian lands. Such an amendment would serve to promote tribal-

State cooperation as well as fairly reflecting the relative cost and the contributions of Indian lands to the reclamation and regulatory program.

We are pleased that section 5 provides for some measure of sharing the Indian AML funds among all tribes. We understand that many noncoal producing tribes need AML funds for reclamation and future regulatory programs.

We are also pleased that section 5(a) provides for the close cooperation between the Secretary and the tribes toward the goal of using AML funds to meet tribally established priorities. Similarly, the authority to utilize AML funds for training, research, judicial, or administrative, and other purposes is an important aspect of this legislation. The tribes vary widely in their capacities to implement this bill. The provision of section 5(e) brings a realistic flexibility to the bill and will do much to ensure the success of both tribal and Federal Indian lands programs.

We recommend the adoption of section 6 which is on tribal regulatory programs. It is extremely important to the tribes that there be every opportunity to assume phased and cooperative responsibility for reclamation and regulation. Section 6 provides legitimate tribal aspiration for self-sufficiency while ensuring full enforcement of SMCRA on Indian lands.

I think we concur with the need to protect surface owners. We recommend the adoption of section 8 as drafted. This provision of the bill will, for the first time, provide full surface owner protection for many Indian tribes. Such protection will promote full implementation of SMCRA and recognize the legitimate interest and concern of tribal surface owners.

A major concern we do have is how the review process is treated. We believe that the provision of section 9(d) relating to de novo Federal court review should be deleted from the bill. Coal operators and other parties are well protected under this bill through the requirements for Secretarial approval for tribal programs. The Secretary can, and most certainly will, ensure that all tribal programs provide a due process safeguard to everyone affected by the approved tribal programs. To the extent that the Secretary fails to discharge his duties, the citizens suit provision of section 10 will provide an effective remedy.

De novo Federal judicial review of tribal court decisions is contrary to our established principles of Federal Indian law and ultimately undermines the ability of the tribes to be self-governing. If the committee believes that some provision for Federal judicial reviews is necessary, then we recommend that such review be limited to the records of the proceedings of the tribal forums. Such an arrangement would assuage any lingering concerns about the ability of the tribes and the Secretary to provide due process. Such an approach might not seriously undermine the tribal self-governance or substantially alter existing legal precedents.

Then, we in essence support various provisions of the bill. We recommend that section 10 on actions by private citizens be adopted as drafted. The Navajo Tribe is fully committed to the role of the judiciary in both the tribal and Federal governments. We believe that section 10 will provide an important mechanism for ensuring that surface mining reclamation and regulatory programs be operated in accordance with the intent of Congress.

We recommend the adoption of section 11 as drafted on grants. We do, however, believe it important for this committee to include language in their report on S. 2879 which makes it clear that the Secretary may extend grants to tribes without regard to the grant formula contained in various sections of SMCRA.

On land acquisition, we recommend that section 12 be adopted as drafted. This section is entirely consistent with Federal Indian law and other acts of Congress.

On conflicts of interest, we recommend that section 13 be adopted as drafted. The language of this section is consistent with similar laws now under consideration by the Navajo Tribal Council. We encourage the Congress and the Secretary to require strict compliance with the language of section (b).

As I mentioned earlier, the Navajo Tribal Council has a strong belief in trying to protect its citizens and the various businesses and operators on Indian lands and will try to ensure that whoever they may be that there is consistent law applicable to everyone.

On archeological, historical, and cultural resource investigation, we recommend the adoption of section 14 with one minor change in paragraph (c). As presently worded, the investigation results would remain confidential until a mining permit application is deemed complete. We suggest that the word "complete" be changed to the word "approved" in order to better effectuate the intent of section 14.

Use of the word "complete" would require disclosure of all investigative reports regardless of whether any particular permit application is ultimately approved or disapproved. The applicant and general public not only have a need for the investigation reports in the event of a particular permit application is approved. In the situation where the permit application is disapproved, the tribe has a legitimate interest in assuring the continued confidentiality of the report.

In conclusion, S. 2879 deserves the full and prompt consideration of this committee and the full Senate. It has now been 7 years since the passage of SMCRA. The need for legislation related to Indian lands has grown greater each year. For the past year, we have worked closely with other tribes, coal operators, and State and Federal officials in an effort to develop this legislation. The Navajo Tribe is hopeful that the introduction of S. 2879 marks the end of the long waiting period and the beginning of a renewed effort by the Congress and tribes in cooperation with other affected parties to fashion appropriate and lasting legislation.

The Navajo Tribe is ready, willing, and able to assume full authority for surface mining regulation and reclamation activities. We have the administrative and judicial capacity to effectively regulate surface mines on the reservation. We have initiated discussions with the coal operators in the State of New Mexico and the Office of Surface Mining to prepare for full assumption of regulatory authority. We believe that S. 2879 will assist us in our goals of economic and governmental self-sufficiency.

We look forward to working closely with the committee to ensure passage of S. 2879 by the full Senate. In closing, we would like again to express our sincere appreciation to you, Senator, and to others who have worked hard to introduce S. 2879. With the modest changes we have proposed, we believe that the bill will prove to be an important part of the Federal Government's effort to promote adequate surface mining regulation and reclamation.

Thank you.

Senator MELCHER. Thank you very much, David, and thank you and the Navajo Nation and all the rest of the tribes for their patience in waiting for some vehicle to take shape to permit you and the rest of the tribes the obvious recognition and authority that should be granted to you by Congress. It has taken a long time to get through that study and even to get to this point where we are first talking about a bill that has been introduced. We know it is a process that has gone on too long, and it is a process that should be brought to a conclusion.

As I said earlier, it may be possible to pass this bill this year. We will try, but if it is not possible, we will try again next year in the next Congress.

Thank you both for being here.

Mr. REDHORSE. Thank you, Senator.

Senator MELCHER. Our last witness is Ivan Sidney, chairman of the Hopi Tribal Council. Welcome, Ivan.

I want to say, on behalf of Senator DeConcini, that he is striving to get here and perhaps will be here at any moment.

STATEMENT OF IVAN SIDNEY, CHAIRMAN, HOPI TRIBAL COUNCIL, ACCOMPANIED BY DONALD AMI, DIRECTOR, OFFICE OF NATURAL RESOURCES, HOPI TRIBE

Mr. SIDNEY. Thank you, Mr. Chairman.

My name is Ivan Sidney, chairman of the Hopi Tribe. I have with me Mr. Donald Ami who is director of our office of natural resources.

It has been an honor to be invited to be here today. Although we have tribal council meetings back at home on other important issues, the bill that you have put together is so important that I should be here personally.

My remarks will be verbal. We will take the opportunity to take up your suggestion here to submit a more detailed written report.

Senator MELCHER. Yes; we would welcome that.

Mr. SIDNEY. Thank you.

Also, I would like to state for the record that the Hopi Tribe traditionally has looked on our resources to be not only precious but ones that when extracted from our lands can never be replaced. So, we take this bill very seriously.

I have three key points that I would like to state here this morning. We talked about sovereignty of Indian tribes for a long time. Just for the record, the Hopi Tribe had entered into a lease with Sentury Royalty Co. back in 1966. From that point, Peabody Coal started extracting coal from our lands beginning in 1977 up to today. You can see that we are very much interested in the outcome of the bill.

As the bill relates to our tribal courts, I have heard this morning comments on the existence of tribal courts. For your information, Mr. Chairman, our tribal court consists of a chief judge who has practiced law in the State of California for many years and is a Hopi himself. Our appellate court system consists of two judges from superior court in two counties in Arizona and also a judge who sits on the Superior Court of the State of Arizona. So, as you can see, our court system does take an interest in having people that can look at the law and look at what would be best to cover all the interests of people that come onto our reservation. If a company goes to the country of Mexico, then it behooves that organization to go and study the Mexican legal system. The same principle applies here. For this reason, the Hopi Tribe would like to assume as much responsibility to give its judicial process that recognition.

According to the bill, we would like to state here that we support the process of judicial review as being that of an on the record review, so that the Federal courts can uphold decisions that the lower courts have made. There are cases where Indian tribal court decisions have been upheld by Federal courts. So, I want to state that also here this morning.

The other part is that I have been to various meetings with the tribes that are presently mining coal, the Crow Tribe and the Navajo Tribe. We had come to an agreement that 85 percent would go to the tribes mining coal and 15 percent would go to other tribes as far as abandoned mine land funds go. We feel that this is necessary because we look at the economics as we see it today. Our tribal council looks at a helping hand, not handouts. We feel for this purpose that we want as much coming back to our reservation to address those much needed economic programs that we would like to see.

The third point that I would conclude my testimony on is that I would recommend to this committee that it strongly look at the interests of our destiny as Indian people as it relates to our sovereignty. So, as I speak of the courts and I speak of the distribution of funds, I would strongly emphasize to the committee that it look very closely at what our statement would be when it comes prior to the expiration of September 1 as you requested.

I believe this concludes my statement here. We are most honored to be here and we will submit a more detailed report as stated.

[Subsequent to the hearing the following material was received for the record. Testimony resumes on p. 146.]

THE HOPI TRIBE

Ivan L. Sidney
CHAIRMAN

VICE-CHAIRMAN

In reply refer to:

August 21, 1984

RECEIVED SEP - 6 1984

Honorable Mark Andrews, Chairman
Senate Select Committee on Indian Affairs
Dirksen Senate Office Building
Washington, D.C. 20510

Dear Mr. Andrews:

As promised during my testimony presented before your distinguished Committee on Friday, August 10, 1984, forwarded herewith are Hopi comments to S. 2879, a Bill to provide for cooperation between the Secretary of the Interior and Indian tribes with respect to the regulation of coal mining operations on Indian lands and the acquisition and reclamation of abandoned mines on such lands, and for other purposes.

On behalf of the Hopi Tribal Council I wish to extend appreciation for being provided the opportunity to present our input to this very important legislation.

The attached comments and recommendations should be read in conjunction with the attached copy of S.2879.

If you have any further questions on this matter, please call me or Mr. Donald E. Ami, Director of the Hopi Office of Natural Resources at 602/734-2441.

Sincerely,

Ivan L. Sidney, Chairman
Chief Executive Officer

xc: Office of Natural Resources
Resources Committee

P.O. BOX 123 — KYKOTSMOVI, ARIZONA — 86039 — (602) 734-2441

Office of Natural Resources

The Indian Coal Mining Regulatory Act of 1984 (S.2879)
COMMENTS AND RECOMMENDATIONS

1. The Hopi Tribe agrees with comments presented by other parties in construing the definition of "Indian Lands" as defined in Section 701(9) of the Surface Mining Control and Reclamation Act of 1977, (Pub.L. 95-87), 30 USC 1231, et seq., to include the broadest definition of Indian jurisdictional situations in their study of Indian lands situations under Section 710(a). However, the Hopi Tribe does not feel that this broad review is limited to the study itself. The Hopi Tribe maintains that with respect to providing regulatory mechanisms for tribal programs which have significantly unique jurisdictional situations, logic requires that each of these significant areas are given due consideration in legislation required under Section 710(a). That is, situations recognized in the study as Indian Lands which do not otherwise fit into standardized formulae under the legislation, or which are not accomodated in other forms, should be separately defined.

   With a number of minor revisions to Section 4 and 5 of this Bill, to a large extent, language in S.2879 could conceivable allow the Hopi and Navajo Tribes to cooperate in the regulation of mining activities on their joint mineral estate. To the extent these proposed revisions are considered in the markup, the Hopi Tribe is in support of the current definition of "Indian Lands" as defined in Section 701(9) of the Surface Mining Control and Reclamation Act of 1977, (Pub.L. 95-87), 30 USC 1231, et seq. If on the other hand the definition is expanded, modified or otherwise revised, we reserve the right to provide additional comments.

2. Page 1 - Long Title:

   Strike the term "**reservation**" in both instances in the Long Title.

3. Page 1 - Long Title:

   Insert the alphabet "**s**" after the existing term "**land**", as it occurs the second time in the Long Title.

4. Page 2 - Line 14 and 15:

   Strike the term "**temporary**".

5. Page 2 - Line 16:

   Strike the term "**reservations**". Insert in place thereof the term "**lands**".

6. Page 2 - Line 18:

Strike the term "reservations". Insert in place thereof the term "lands".

7. Page 3 - Lines 3 to 8:

Option 1:

Strike the definition of Indian Lands in whole. Except for an ommission of a comma (",") between the terms "interests" and "within" on Line 4, this definition does not amend the definition as it exists in Section 701(9) of the Surface Mining Control and Reclamation Act of 1977, Pub.L. 95-87, 30 USC 1231 (1977), hereinafter SMCRA.

Option 2:

In reference to Item 8 of these comments, if Option 2 is adopted, this definition should remain. Insert a comma (",") between the terms "interests" and "within" on Line 4.

8. Page 3 - Line 22:

Strike the term "in". Insert in place thereof the term "of".

9. Page 4 - Lines 4 to 11 - Section 4:

Option 1:

Strike Section 4 in its entirety.

a.) Subsection (a) appears to disregard SMCRA Section 523 rules as they apply to federal lands outside the exterior boundaries of an Indian Reservation which are currently under the regulation of a federal lands progam. Is it the intent of S. 2879 to amend SMCRA to eliminate these provisions and to provide for automatic assumption of regulatory authority over all federal lands outside the exterior boundaries of an Indian Reservation by a state regulatory agency even if it is currently under a federal lands program? Because the language of this subsection effectively allows this to happen, does this part also preclude the need for federal responsibilities under section 504 of SMCRA?

b.) Section 4(a) does not address the unique jurisdictional situation of the Hopi-Navajo Land Dispute area. Many years of federal congressional action and litigative history have not truly defined if and where the respective Hopi and Navajo governmental jurisdictions are divided. Briefly;

i) Pursuant to the Act of July 22, 1958, (Pub.L. 85-547), 72 Stat. 403, and the Healing v. Jones Judgement, Healing v. Jones, 210 F.Supp. 125 (D.Az. 1962), aff'd per curiam, 373 U.S. 758 (1963), both the surface and the minerals of the Joint Use Area were determined to be a joint reservation for both the Hopi and Navajo Tribes.

ii) Shortly before the 1974 Hopi-Navajo Land Settlement Act was enacted (Pub.L. 93-531), the Associate solicitor for the Department of Interior issued an opinion stating that the Hopi Tribe had governmental jurisdication to enact ordinances applicable to the Joint Use Area.

iii) The 1974 Hopi-Navajo Land Settlement Act authorized the federal court to partition only the surface interest of the Joint Use Area, and only that surface interest has been partitioned. The minerals underlying the Joint Use Area were not affected by that partition, and they have retained their status as part of a joint reservation of both tribes.

iv) Similarly, the 1980 Navajo and Hopi Indian Relocation Amendments to the 1974 Act (Pub.L. 96-305), provided that each tribe should have normal governmental jurisdiction over "lands partitioned" to them; since the mineral interest was not partitioned, those provisions do not apply and may not be construed to separate Hopi governmental jurisdiction extending to the minerals under the Navajo partitioned area. (JPK 3/18/83)

Option 2:

Strike section 4 in its entirety. Insert in place thereof the phrase **"All Indian Lands as defined in section 3 of this Act shall be subject to the provisions of this Act."**

10. Pages 4 to 7 - Section 5:

The revisions proposed for this Section are based on statutory, administrative and regulatory Indian Federal Law, and are premised on the concept of trust protection. That is, any funds generated from a trust estate, as AML monies generated by Indian coal are, are governed by distinctly separate rules of trust. In general terms, this means either reinvesting the funds in the trust or expanding the funds for the benefit of the trust.

Because of the numerous recommended revisions, this section is typed in its entirety as Item 21 below.

11. Page 5 - Line 1 and 2:

Strike the phrase **"within the exterior boundaries of"**. Insert in place thereof **"conducted on"**.

12. Page 5 - Line 2:

Strike the term **"reservations"**. Insert in place thereof the term **"lands"**.

13. Page 5 - Line 4:

    Strike the term "**Fifty**". Insert in place thereof the term "**Eighty-five**".

14. Page 5 - Line 8:

    Strike the phrase "**in any State or**".

15. Page 5 - Line 13:

    Strike the term "**State**". Insert in place therof the term "**Tribal**".

16. Page 5 - Lines 15 to 18:

    Strike the phrase "**or to approved tribal regulatory programs pursuant to section 5 of this Act when the Secretary finds that such programs are the best means of accomplishing the specific reclamation projects.**"

    With a minimum of difficulty, tribal regulatory agencies can conduct abandoned mine reclamation, however, this concept is not consistent with the idea of developing tribal regulatory programs into administrative and politically independent regulatory agencies. The Hopi Tribe holds that tribes, under authority of their sovereignty and mandates of the Indian Self-Determination and Education Assistance Act of 1975, (Pub. L. 93-638), 25 USC 450 et. seq., et al, should determine for themselves what their needs and priorities are under Title IV. To legislate a requirement to utilize Title IV monies under this part and portions of Section 5(e) for purposes other than those required by SMCRA could unjustly require tribes to expend Title IV monies to support their regulatory programs. Funding of tribal regulatory programs should be a separate administrative function which, at a minimum, should be consistent with provisions of Section 705(a) of SMCRA. Ideally, Section 11 of S. 2879 precludes the need for additional Title IV funding of tribal regulatory programs.

17. Page 5 - Line 19:

    Strike the phrase "**States or**".

18. Page 6 - Line 5:

    Strike the phrase "**in the Tribal Fund**". Insert in place thereof the phrase "**generated by this section**".

19. Page 7 - Lines 1-6, SubSection 5(d):

Strike this subsection in its entirety. Following modifications to Items 10, 11, 12, 13, 14, 15, 16, 17, and 18, above, this subsection becomes redundant.

20. Page 7 - Line 12:

Strike the term "exposed". Insert in place thereof the term "expended".

21. Page 7 - Line 12-22:

Strike subsections (1), (2), (3), & (4) in their entirety. Following the phrase "**Funds may be expended for**", insert in place thereof, the following "**the purposes and requirements set out in sections 402 (g), 403, 404 & 409 of the Surface Mining Control and Reclamation Act of 1977 (30 USC 1232(g); 1233; 1234; and 1239);**

(1) For the purposes of this Act, Section 402(g)(2) of the Surface Mining Control and Reclamation Act of 1977 (30 USC 1232(g)) shall be construed in accordance with the needs and priorities duly established by an Indian Tribe under Section 405 of SMCRA.

(2) The Secretary shall assure sufficient funds are made available annually to carry out the purposes of this section."

The Hopi Tribe holds that, to the extent the requirements do not impose undue restrictions on a Tribe's ability to determine its own needs and priorities, tribal Title IV funds should initially be expended in a manner consistent with existing requirements of SMCRA. See item 16 above.

22. S. 2879 - Section 5:

Modify Section 5 of this Bill as follows:

"**Sec. 5.(a)(1) There is hereby created within the Treasury of the United States a trust fund to be known as the Tribal Abandoned Mine Reclamation Fund (hereinafter referred to as the "Tribal Fund") which shall be administered by the Secretary of the Interior. The Tribal Fund shall be administered separately from, and without regard to, the Abandoned Mine Reclamation Fund created under the Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. 1231).**

(1) All other finds generated pursuant to Sections 401(b)(2), 401(b)(3) and 401(b)(4) of the Surface Mining Control and Reclamation Act of 1977. (30 USC 1231).

(2) The Tribal Fund shall consist of -

(A) Fifty per centum of amounts deposited pursuant to section 401(b) of the Surface Mining control and Reclamation Act of 1977 (30 U.S.C. 1231(b)) which were generated by mining activities conducted on Indian lands prior to the date of enactment of this Act; and

(B) Eighty-five per centum of funds hereinafter collected from mining activity on such lands pursuant to section 401(b) of such Act.

(C) All funds generated pursuant to part (b) of this section.

(3) The balance of funds referred to in paragraph (2) may be expended to any Indian tribe at the descretion of the Secretary in order to meet the purposes of this Act and Title IV of the Surface Mining Control and Reclamation Act of 1977. Such funds may be expended directly by the Secretary or by making additional grants to approved Tribal reclamation programs pursuant to Section 405 of the Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. 1235). The Secretary shall consult and coordinate with the respective tribes those projects funded directly or in conjunction with other Federal agencies.

(b) The Secretary of the Interior shall invest, on a quarterly basis, all receipts accruing to the Tribal Fund. Such investments shall be in public debt securities with maturities suitable for the needs of the Tribal Fund and bearing interest at rates determined by the Secretary of the Treasury, taking into consideration current market yields on outstanding marketable obligations of the United States of comparable maturities. The income on such investments shall be credited to, and form a part of, the Tribal Fund.

(c)(1) All funds generated by this Section shall be expended on Indian lands to meet the purposes of this Act.

Funds deposited in the Tribal Fund annually pursuant to part (a)(2) of this Section shall be allocated by the Secretary to the Indian tribe having the ownership interest.

(3) In the event of multiple tribal ownership interests in the coal, the funds shall be allocated to the Indian tribes under paragraph (2) of this subsection in direct proportion to their ownership interests.

(4) The balance of the funds collected on an annual basis shall be expended, upon appropriation, on Indian lands, including those Indian lands from which no funds have been derived but which have been adversely affected by past mining and should be reclaimed to meet the purposes of this Act. Such funds may be expended directly by the Secretary or by making grants to approved tribal reclamation programs pursuant to this

Section. The Secretary shall consult and coordinate with the respective Indian tribes regarding those projects funded directly or in conjunction with other Federal agencies.

(d) Indian tribes, pursuant to an approved tribal abandoned mine reclamation plan, or the Secretary in the absence of an approved plan and in consultation and coordination with the Indian tribe, may expend funds appropriated from the Tribal Fund based upon the needs and priorities established by the Indian tribes. Funds may be expended for "the purposes and requirements set out in Sections 402 (g), 403, 404 & 409 of the Surface Mining Control and Reclamation Act of 1977 (30 USC 1232(g); 1233; 1234; and 1239); (1) For the purposes of this Act, Section 402(g)(2) of the Surface Mining Control and Reclamation Act of 1977 (30 USC 1232(g)) shall be construed in accordance with the needs and priorities duly established by an Indian Tribe under Section 405 of the Surface Mining Control and Reclamation Act.
(2) The Secretary shall assure sufficient funds are made available annually to carry out the purposes of this section."

23. Page 8 - Line 3 and 4:

Strike the phrase **"within the exterior boundaries of the reservation"**. Insert in place thereof the phrase **"on Indian Lands"**.

24. Page 9 - Line 13:

Strike the terms **"and (d)"**.

In response to a proposed rule making action published in October 1983, the Hopi Tribe, and others including Peabody Coal Company, have for various reasons questioned the authority of the Department of Interior to promulgate regulations under Section 710(d). The Hopi Tribe construes Section 710(d) to define the absolute minimum requirements to be developed for Indian lands under this legislation. The mandated sequence of major events under Section 710 are:

a. Conduct Indian Lands Study. Submit study and proposed legislation to Congress no later than Jan. 1, 1978.
b. On and after one-hundred and thirty-five days (January 17, 1978) promulgate rules under 710(c).
c. On and after thirty months for enactment of SMCRA (February 3, 1980) promulgate rules under 710(d).

Section 710(d) stands as a minimum requirement, and we suggest the mechanism for promulgating implementing regulations developed under this legislation.

25. Page 10 - Line 4:

Strike the disclaiming phrase **"As soon as practically possible, but not"**. Insert in place thereof the term **"No"**.

26. Page 10 - Line 13:

Strike the phrase **"States or"**.

27. Page 10 - Line 17:

Insert the term **", 505"** between the terms **"504"** and **"and"**.

28. Page 11 - Line 4:

Strike the phrase **"or States"**. Insert in place thereof the phrase **"or other Indian Tribe"**.

29. Page 11 - Line 8:

Strike the phrase **"or states,"**.

30. Page 11 - Line 14:

Strike the phrase **"Federal Government"**. Insert in place therof the term **"Secretary"**.

31. Page 13 - Lines 6 to 8:

Strike the phrase **"Review of tribal court judgements shall be denovo and subject to the standards set forth in Section 706(2) of title 5, United States Code"**. Insert in place thereof **"On the record reviews of tribal court judgements shall be under standards set forth in Section 706(2)(B) of title 5 of the United States Code"**.

32. Page 13 - Line 22:

Insert between the terms **"the"** and **"tribal"** the terms **"Secretary or"**.
In the event a partial program is effective, the Secretary will be responsible for a portion of the total program. Also, if Section 9 can be construed to mena thet the Secretary will retain his responsibilities insofar as SMCRA criminal enforcement provisions go, a private citizen should be provided an avenue to compel the Secretary to meet these secretarial responsibilities hereinunder?

33. Page 13 - Line 24:

Insert between the terms **"the"** and **"tribal"** the terms **"Secretary or"**.

See Item 31 above.

34. Page 14 - Lines 4 and 5:

Strike the phrase **"by the tribal regulatory authority,"**.

35. Page 14 - Line 5:

Insert between the terms **"whatever"** and **"sanctions"** the term **"reasonable"**.

36. Page 14 - Line 13 and 14:

Strike the terms **"includes any"**. Insert in place thereof **"means a member of the affected"**.

If under S.2879 Congress proposes not to recognize full comity of Hopi Court actions by legislating a denovo review of those decisions, and if certain enforcement sanctions otherwise available under Surface Mining Control and Reclamation Act of 1977 are not available to the Tribe, the Hopi Tribe does not feel compelled to provide standing in its courts to any entities other than tribal members.

37. Page 17 - Lines 4 to 19 - Section 17:

Strike section 17 in its entirety. Insert in place thereof the following: **"The Secretary shall submit an annual report to the President and to the Congress concerning activities conducted by him, the Federal Government, and the Indian tribes under this Act, during the preceding twelve-month period. Among other matters, the Secretary shall include in such report recommendations for additional administrative or legislative action as he deems necessary and desireable to accomplish the purposes of this Act."**

The Hopi Tribe is of the opinion that to the maximum extent possible, S.2879 should track Surface Mining Control and Reclamation Act language.

38. Page 17 - Line 15:

Strike the phrase **"of the Interior"**.

39. Page 17 - Lines 15 to 17:

Strike the phrase **", and from the Tribal Fund established pursuant to section 4 of this Act,"**.

See Item 16

II

98TH CONGRESS
2D SESSION

S. 2879

To provide for cooperation between the Secretary of the Interior and Indian tribes with respect to the regulation of coal mining operations on Indian **reservation** lands and the acquisition and reclamation of abandoned mines on such land, and for other purposes.

IN THE SENATE OF THE UNITED STATES

JULY 27 (legislative day, JULY 23), 1984

Mr. MELCHER (for himself and Mr. DECONCINI) introduced the following bill; which was read twice and referred to the Select Committee on Indian Affairs

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A BILL

To provide for cooperation between the Secretary of the Interior and Indian tribes with respect to the regulation of coal mining operations on Indian ~~reservation~~ lands and the acquisition and reclamation of abandoned mines on such land, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Indian Coal Mining Regulatory Act of 1984".

SEC. 2. The Congress finds and declares that—

(1) there exists between the Government of the United States and Indian tribes a special and unique trust relationship;

(2) as part of that trust relationship, congressional policy favors tribal self-determination which recognizes the special cultural values and identities of Indian tribes;

(3) Indian tribes own and control an estimated 15 per centum of the country's coal resources which may be recovered by surface mining, including nearly one-third of the low-sulfur strippable coal of the Western United States;

(4) surface mining operations on Indian lands result in disturbances of surface lands that may [redacted] adversely impact the commerce, public welfare, and environment of Indian lands [redacted];

(5) the governmental responsibility for regulating surface mining and its effects on Indian lands [redacted] should rest with the Indian tribes at their election; and

(6) because the jurisdictional status of Indian lands is unique, it is necessary to provide for surface mining regulation thereon by legislation separate from that enacted to apply to other lands throughout the United States.

DEFINITIONS

SEC. 3. For the purposes of this Act—

[redacted]

(2) The term "tribal regulatory program" means a full or partial program established by an Indian tribe to regulate surface coal mining and reclamation operations on Indian reservation lands in accordance with the requirements of this Act and regulations promulgated pursuant thereto.

(3) The term "Federal Indian lands program" means a program for Federal regulation of surface coal mining and reclamation operations on Indian reservation lands in accordance with this Act in the absence of, or in conjunction with, a full or partial tribal regulatory program.

(4) The term "tribal regulatory authority" means the department or agency of an Indian tribe that has primary responsibility at the tribal level for administering this Act.

(5) The term "Secretary" means the Secretary of the Interior. [redacted] <No change>

APPLICATION OF PROVISIONS TO INDIAN LANDS

[redacted]

TRIBAL ABANDONED MINE RECLAMATION FUND

SEC. 5. (a)(1) There is hereby created within the Treasury of the United States a trust fund to be known as the Tribal Abandoned Mine Reclamation Fund (hereinafter referred to as the "Tribal Fund") which shall be administered by the Secretary of the Interior. The Tribal Fund shall be administered separately from, and without regard to, the Abandoned Mine Reclamation Fund created under the Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. 1231).

(2) The Tribal Fund shall consist of—

(A) Fifty per centum of amounts deposited pursuant to section 401(b) of the Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. 1231(b)) which were generated by mining activities conducted on [redacted] [redacted]f Indian lands [redacted] prior to the date of enactment of this Act; and

(B) Eighty-five [redacted] per centum of funds hereinafter collected from mining activity on such lands pursuant to section 401(b) of such Act.

(3) The balance of funds referred to in paragraph (2) may be expended [redacted] Indian tribe at the discretion of the Secretary in order to meet the purposes of this Act and title IV of the Surface Mining Control and Reclamation Act of 1977. Such funds may be expended directly by the Secretary or by making additional grants to approved tribal [redacted] reclamation programs pursuant to section 405 of the Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. 1235)[redacted]. The Secretary shall consult and coordinate with the respective [redacted] tribes those projects funded directly or in conjunction with other Federal agencies.

(b) The Secretary of the Interior shall invest, on a quarterly basis, all receipts accruing to the Tribal Fund. Such investments shall be in public debt securities with maturities suitable for the needs of the Tribal Fund and bearing interest at rates determined by the Secretary of the Treasury, taking into consideration current market yields on outstanding marketable obligations of the United States of comparable maturities. The income on such investments shall be credited to, and form a part of, the Tribal Fund.

[illegible]

(c)(1) All funds [redacted] shall be expended on Indian lands to meet the purposes of this Act.

(2) Eighty-five per centum of the funds deposited in the Tribal Fund annually shall be allocated by the Secretary to the Indian tribe having the ownership interest.

(3) In the event of multiple tribal ownership interests in the coal, the funds shall be allocated to the Indian tribes under paragraph (2) of this subsection in direct proportion to their ownership interests.

(4) The balance of the funds collected on an annual basis shall be expended, upon appropriation, on Indian lands, including those Indian lands from which no funds have been derived but which have been adversely affected by past mining and should be reclaimed to meet the purposes of this Act. Such funds may be expended directly by the Secretary or by making grants to approved tribal reclamation programs pursuant to section 3 of this Act. The Secretary shall consult and coordinate with the respective Indian tribes regarding those projects funded directly or in conjunction with other Federal agencies.

[redacted]

d

(c) Indian tribes, pursuant to an approved tribal abandoned mine reclamation plan, or the Secretary in the absence of an approved plan and in consultation and coordination with the Indian tribe, may expend funds appropriated from the Tribal Fund based upon the needs and priorities established by the Indian tribes. Funds may be [redacted]— 2.

[redacted]

(7)

TRIBAL REGULATORY PROGRAMS

SEC. 6. (a)(1) If surface coal mining operations are or may be conducted on Indian lands [redacted] of any Indian tribe, such Indian tribe may submit to the Secretary a tribal regulatory program.

(2) An Indian tribe may, at its discretion, adopt a partial, phased program for the regulation of surface mining, to be implemented over such period of time as may be necessary for the development of expertise in the technical, scientific, administrative, and judicial aspects of the program. The decision whether to pursue full or partial regulatory authority, and the time required for development of full regulatory authority, shall rest solely with the Indian tribe.

(3) Secretarial approval of a tribal program may include phasing, as provided in paragraph (2) above, and an expected sequence of actions over time in order to assure the full realization of the objectives of the tribal program.

(b) the Secretary is authorized to approve a tribal abandoned mine reclamation program prior to the Indian tribe's adoption of a full or partial tribal regulatory program as provided by this Act.

(c)(1) The Secretary shall approve or disapprove a tribal regulatory program in whole or in part, within six calendar months after the date such program is submitted to the Secretary.

(2) If the Secretary disapproves any tribal regulatory program, in whole or in part, he shall notify the Indian tribe in writing of this decision and set forth in detail the reasons for the denial. The Indian tribe may resubmit a revised tribal program, or portion thereof, within ninety days from the date of receipt of the Secretary's decision.

(3) The Secretary shall approve or disapprove the resubmitted tribal regulatory program or portion thereof within ninety days after the date of resubmission.

(d) With respect to the application of sections 501(a) and 502 of the Surface Mining Control and Reclamation Act (30 U.S.C. 1251(a); 1252), the actions taken by the Secretary pursuant to subsections (c) [redacted]f section 710 of such Act (30 U.S.C. 1300(c)–(d)) shall remain in effect until the day after the day of approval of a full or partial tribal program, or a Federal Indian lands program.

(e) Within six months after the date of enactment of this Act, the Secretary shall prescribe and publish in the Federal Register regulations concerning tribal regulatory programs consistent with and in accordance with the Surface Mining Control and Reclamation Act of 1977 and the provisions of this Act. Such regulations shall also include those standards and procedures necessary for the formulation, implementation, and assumption of administrative and judicial responsibilities, including the secretarial approval therefor, pursuant to this Act.

FEDERAL INDIAN LANDS PROGRAMS

SEC. 7. (a) [redacted] No~~t~~ later than eighteen months following the date of enactment of this Act, the Secretary shall implement a Federal Indian lands program for those aspects of titles V and VII of the Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. 1201–1328) which have not been assumed by an Indian tribe under an approved tribal regulatory program as provided for in this Act. Such Federal Indian lands program shall,' at a minimum, be consistent with and in accordance with an approved [redacted] Federal permanent lands program for the State in which the Indian lands are located.

(b) In order to complement the approval of a phased tribal program, the enforcement of a Federal Indian lands program shall be conducted in accordance with sections 504 [redacted] and 521 of the Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. 1254; 1271).

(c)(1) Any Indian tribe may elect to enter into a cooperative agreement with the Secretary to provide for tribal participation in the regulation of surface coal mining and reclamation operations on Indian lands under a Federal lands program implemented by the Secretary under subsection (a).

(2) In any case where a mining operation extends beyond the exterior boundary of an Indian reservation, an Indian tribe may enter into a cooperative agreement with the State or Indian tribe [redacted] in which the operation is also located to provide for tribal participation in the regulation of surface coal mining and reclamation operations. Such agreement must adopt the most stringent environmental protection standards of the State, ~~or States,~~ or Indian tribe that is party to such agreement, regardless of the regulatory entity.

(3) Assumption of regulatory responsibilities under a cooperative agreement may be part of the implementation of a tribal regulatory program.

(d) In the absence of any tribal regulatory program, the Secretary [redacted] pursuant to section 504 of the Surface Mining Control and Reclamation Act of 1977 shall be the exclusive authority regulating surface coal mining and reclamation operations on the Indian reservation.

SURFACE OWNERS

SEC. 8. (a) Notwithstanding subsection (f) of section 714 of the Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. 1304), the provisions of subsections (c), (e), and (g) of such section shall apply to all coal owned by and all coal held in trust by the United States for an Indian or an Indian tribe under land the surface rights to which are owned by a surface owner as defined in subsection (e) of section 714 where the coal is to be mined by methods other than underground mining techniques.

(b) The provisions of subsections (c), (e), and (g) of section 714 of the Surface Mining Control and Reclamation Act of 1977 shall apply to all persons, including Indians and Indian tribes, that meet the surface owner requirements of paragraphs (1), (2), and (3) of subsection (e) of such section.

PENALTIES

SEC. 9. (a) Notwithstanding the penalty provisions of Public Law 90-284 (25 U.S.C. 1301, et seq.), popularly known as the Indian Civil Rights Act, the civil penalty provisions of any tribal program shall incorporate penalties no less stringent than those set forth in section 518 of the Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. 1268) and shall contain the same or similar procedural requirements thereof.

(b) Tribal courts or any other tribal authority designated in an approved tribal program shall have original jurisdiction to impose civil penalties and sanctions under this Act on all persons who violate this Act (including members of the Indian tribe and individuals who are not members of the Indian tribe) who are engaged in surface coal mining and reclamation operations on Indian lands.

(c) Civil penalties imposed under this Act may be recovered in a civil action brought by the tribal regulatory authority in tribal court.

(d) Any final tribal court judgment rendered under the provisions of this Act shall be appealable to a district court of the United States. On the record reveals [redacted]ion [redacted]

(e)(1) Nothing in this Act shall be construed to eliminate any additional enforcement rights or procedures which are available under tribal or Federal law to a tribal regulatory authority but are not specifically enumerated herein.

(2) Nothing in this Act shall be construed as granting tribal courts criminal jurisdiction over any person who is not an Indian.

ACTIONS BY PRIVATE CITIZENS

SEC. 10. (a) Any person having an interest which is or may be adversely affected may commence a civil action, as provided in section 520 of the Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. 1270) on his own behalf against the Secretary in order to compel compliance with this Act if such person alleges in such action that the tribal regulatory authority has failed to perform any act or duty under this Act which is not discretionary with the Secretary tribal regulatory authority and for which the Secretary bears oversight responsibility. The tribal regulatory authority may intervene as a matter of right in such actions. If the action is resolved in favor of the complainant, the Secretary shall take affirmative action to assure compliance [redacted] including the application of whatever reasonable sanctions he may deem appropriate or necessary.

(b) In addition to the action provided in subsection (a), any person having an interest which is or may be adversely affected may commence a civil action on his own behalf to compel compliance with this Act and damages under the procedures provided in section 520 of the Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. 1270).

(c) For purposes of this section, the term "person" [redacted] member of the affected Indian tribe.

GRANTS

SEC. 11. The Secretary is authorized to make grants to any Indian tribe for the purpose of assisting such tribe in developing, administering, and enforcing tribal programs under this Act, including the development, maintenance, and administration of tribal court activities that are necessary to carry out the purposes of this Act.

LAND ACQUISITIONS

SEC. 12. Any land acquired—

(1) by the Secretary on behalf of any Indian tribe, or

(2) by any Indian tribe,

under the provisions of this Act shall be held in trust by the Secretary for the benefit of such tribe.

CONFLICT OF INTERESTS

SEC. 13. (a) Except as provided in subsection (b), any financial interest of a person in any underground or surface coal mining operation which exists solely by reason of such person's membership in an Indian tribe shall not be treated as creating a conflict of interest that precludes appointment of such person to, or employment of such person with, any tribal regulatory authority having responsibilities under this Act.

(b) No person having a direct financial interest in a coal operation, or employed by an Indian tribe in a coal operation in which the tribe has a direct profit interest may serve in any capacity within a tribal regulatory authority.

ARCHAEOLOGICAL, HISTORICAL, AND CULTURAL RESOURCE INVESTIGATIONS

SEC. 14. (a) All mining permit applications submitted either under a tribal regulatory program or under the Federal Indian lands program shall be subject to an archaeological, historical and cultural resources investigation of the proposed mining area. Such investigation shall be complete and shall be evaluated by the tribe prior to any further consideration of the mining permit application.

(b) All information resulting from such investigation shall be the sole and exclusive property of the tribe and shall remain confidential except as provided in subsection (c) of this section.

(c) All information resulting from the archaeological, historical and cultural resource investigation on lands subject to such permit application to mine, shall be made part of the permit application only when such permit application is deemed complete by the tribe.

APPLICATION WITH THE SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977

SEC. 15. For all purposes not inconsistent with this Act, Indian tribes shall be considered as "States" for purposes of meeting the provisions of the Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. 1201–1328) and its provisions are hereby applicable to tribal regulatory programs and Federal Indian lands programs.

REGULATIONS

SEC. 16. (a) The Secretary shall prescribe such regulations as may be necessary to carry out the provisions of this Act.

(b) The regulations prescribed by the Secretary under this Act shall be consistent with and in accordance with the regulations prescribed under the Surface Mining Control and

Reclamation Act of 1977 to the extent that the provisions of this Act are similar to the provisions of such Act.

ANNUAL REPORT

SEC. 17. The Secretary shall submit an annual report to the President and to the Congress concerning—

[redacted]- [illegible]

[redacted] activities conducted [redacted] by [illegible] [redacted] and

the Indian tribes under this Act, [illegible]

during the preceding twelve-month period. [illegible] [redacted] shall include [illegible] [redacted] recommendations for [illegible] [redacted] administrative [illegible] action [illegible] [redacted] necessary and [redacted] desirable to accomplish the purposes of this Act.

AUTHORIZATION OF APPROPRIATIONS

SEC. 18. There is authorized to be appropriated to the Secretary [redacted] for the purposes of this Act, [redacted] such sums as may be necessary to carry out the purposes of this Act. All such funds appropriated shall remain available until expended.

SEVERABILITY

SEC. 19. If any provision of this Act, or the applicability of any provision of this Act to any person or circumstances, is held invalid, the remainder of this Act and the application of such provision to other persons or circumstances shall be not affected thereby.

THE HOPI TRIBE

Ivan L. Sidney
CHAIRMAN
Clifford Balenquah
VICE-CHAIRMAN

In reply refer to:

RECEIVED SEP 21 1984

September 18, 1984

Senator Mark Andrews
Senate Select Committee on Indian Affairs
Dirksen Senate Office Building
Washington, D.C. 20510

Dear Senator Andrews:

On August 21, 1984 the Hopi Tribe submitted comments to S.2879, The Indian Coal Mining Regulatory Act of 1984. These comments were developed in the spirit of extending prudent cultural and environmental protections to Hopi Lands while in the meantime affording outside agencies opportunities to exploit Hopi resources.

Our stance on the following issues remains unchanged:

1.) The Hopi Tribe has submitted a number of minor revisions to Sections 4 and 5 of S.2879 which would satisfy the requirements of the Tribe until the land exchange provisions of Pub.L. 93-305 are resolved. This issue was transmitted to your office by telegram dated September 13, 1984.

2.) In regard to abandoned mine land fees, the Hopi Tribe advocates for a 100% return to Tribal lands. 85% to the tribe/s of origin and 15% to other tribes demonstrating a need for abandoned mine land reclamation. Funds generated from trust property should be treated as trust assets.

3.) Abandoned mine lands funds should not be utilized to support regulatory functions unless a tribe determines to utilize this funding option.

4.) The Hopi Tribe advocates for the design of Section 5 of S.2879 to be as indicated in the August 21, 1984 Hopi comments.

5.) On appeals to Federal court, Tribal courts must be given full faith and credit in on the record reviews.

6.) On matters where the Secretary's responsibilities under S.2879 are not significantly different from rules governing State situations under the Surface Mining Control and Reclamation Act of 1977, the language of SMCRA should hold. (Promulgation of rules, drafting of cooperative agreements, etc.).

7.) Federal, state and local governments all exercise self-governing regulatory authorities to a certain degree. Indian Tribes would be no different under provisions of the Indian Minerals Development Act of 1982. The Hopi Tribe does not agree with other agencies that a significant conflict of interest will arise in these situations.

8.) In terms of cultural, archaeological and historic mitigation measures, the Hopi Tribe advocates for an across the board application of standards. Granted, previous work in these areas certainly should be considered in evaluating compliance with this Bill. Any attempt to grandfather previous unexamined works by use of a blanket permit should not be granted.

To this date, neither my office nor the Hopi Tribal Council have officially designated any outside agency to speak on our behalf on matters pertaining to surface mining on Hopi Lands. I apologize for any inconveniences this may cause, but the Tribe's position remains that we do not support negotiated settlements addressing issues of Hopi sovereignty made by outside agencies.

If you have any questions on these matters please call me or Donald E. Ami, Director, Hopi Office of Natural Resources at 602/734-2441.

Sincerely,

Ivan L. Sidney, Chairman
Chief Executive Officer

xc: ONR
Resources Committee
Negotiation Committee

Senator MELCHER. Ivan, thank you very much. I appreciate the fact that you have come here on very short notice. I know the sacrifice you have made is considerable to be able to counsel with us on this bill.

I admonish you and all the other tribes to keep up with this because the committee's goal is to present to this Congress in September a bill that is satisfactory, a bill that is good for the tribes, and good for the future of coal development on Indian reservations. That will not come easily. It will take further detailed work over the next 30 days just to know whether we can have a good bill. Your comments and any language changes that you believe should be made, if we have them by September 1, will be studied. We will take a good strong attempt to pass it in September. Since we are probably going to adjourn here within the first few days of October, it will be difficult, but it is possible.

We know that you are mining coal, and the Navajos are mining coal. The Sarpi Basin coal belonging to the Crows is in the process. That is all. But many other tribes perhaps will want, as soon as possible, the opportunity to develop their own mining of coal. I think they need that opportunity based on what this law will be when we are able to pass it. I think for the sale of the coal that is being mined now, including the Hopi coal, that the bill offers advantages. it is time that we permit those advantages to flow to the tribes.

So, I know the sacrifice that you are making, but I do not think it is wasted. I think it is a good effort, and we will work with you.

Mr. SIDNEY. Mr. Chairman, may I make one more comment on something I overlooked?

Senator MELCHER. Yes.

Mr. SIDNEY. That is in the area of the definition of Indian lands. We prefer that Indian lands remain as contained in SMCRA. The current language in S. 2879 now refers to on-reservation and off-reservation land. It does not meet our needs at the present time.

On the Hopi Reservation, on February 10, 1977, lands were partitioned between the Hopi and Navajo Tribes. As a result, however, it did not include the minerals. We still own the minerals on a 50/50 basis. For that reason, when there is mining done on the Navajo partitioned land, half of that is our minerals. Likewise, it will be if the mining is going into the lands partitioned to the Hopi and the Navajo will have half of that, and we want to work together on that. So, I would like to see the definition where it includes such.

Again, it is an honor to be here, and I really appreciate your interest on behalf of Indians for taking this bill to where it is now. I would only request that our comments be strongly recognized by you and be included in the markup.

Senator MELCHER. Thank you very much, Ivan.

Mr. SIDNEY. Thank you, Senator.

Senator MELCHER. Thank you also, Don.

The witness list has been concluded and the hearing is adjourned.

[Whereupon, at 11:55 a.m., the hearing was adjourned.]

APPENDIX

ADDITIONAL MATERIAL RECEIVED FOR THE RECORD

LAW OFFICES OF
DECHERT PRICE & RHOADS
3400 CENTRE SQUARE WEST
1500 MARKET STREET
PHILADELPHIA, PA 19102
TELEX 84 5324 • BARDEP
(215) 972-3400

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1040 BRUSSELS, BELGIUM
(02) 511 88 40

52 BEDFORD SQUARE
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1730 PENNSYLVANIA AVENUE, N.W.
WASHINGTON, DC 20006
(202) 783-0300

800 NORTH THIRD STREET
HARRISBURG, PA 17102
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August 31, 1984

RECEIVED SEP 1984

HAND DELIVER

Senate Select Committee on
  Indian Affairs
Senate Hall Building #838
Second Street and
  Constitution Avenue
Washington, DC 20510

Ladies and Gentlemen:

Re: Senate Bill 2879 -- Indian Coal Mining Regulatory Act

We send you this letter on behalf of our client, Westmoreland Resources, Inc., ("Westmoreland") which is engaged in mining coal at the Absaloka Mine in Montana. This mining operation is conducted pursuant to a lease issued by the Crow Tribe of Indians and approved by the United States Department of the Interior. The Absaloka Mine is on what is known as the "ceded strip," having been a part of the Crow Reservation until 1904 when the Crow ceded this territory to the United States to sell surface lands but to retain the mineral interests for the benefit of the Tribe.

The principal effect of Senate Bill 2879 on Westmoreland's operation from its point of view is that the Bill would clarify the authority of the Montana Department of State Lands ("DSL") to regulate Westmoreland's operation pursuant to the terms of DSL's approved program under the Surface Mining and Reclamation Act of 1977 with respect to both Indian and State-owned coal. It will also make clear that the Crow Tribe has no regulatory jurisdiction over the mining operation absent a cooperative agreement between DSL and the Crow Indian Tribe.

Westmoreland Resources strongly supports Senate Bill 2879 because it would settle the uncertainty as to who has regulatory jurisdiction over Westmoreland's mining operation on the ceded strip. The difficulties which Westmoreland has had with dual regulation and the importance of placing regulatory responsibility over its operations with the State of Montana are described in an attachment to this letter. The final resolution of these jurisdictional issues is of paramount importance to Westmoreland.

Westmoreland recognizes, however, that DSL and the Crow Indian Tribe have a number of problems with respect to some provisions of the Bill, particularly with respect to pending litigation. Accordingly, Westmoreland Resources has attempted to see that these parties reach a concensus with respect to supporting Senate Bill 2879. A meeting was held among representatives of DSL, the Crow Tribe, and Westmoreland Resources on August 23, 1984. Significant agreements were reached at that meeting which have been reduced to a draft memorandum. Unfortunately, counsel for the DSL has been tied up in forest fire matters in Montana and has been unable to review the draft memorandum. We would anticipate being able to submit a memorandum with respect to the agreements reached on the bill early next week. Accordingly, we would ask that the record be kept open to receive this memorandum from the Crow Tribe, DSL, and Westmoreland Resources.

There are a few technical changes which Westmoreland would like to have made in the Bill which will better express the intent of the drafters of the Bill.

Section 4(a) of the Bill would make lands off the reservation subject to the provisions of Title IV and V of the Surface Mining Control and Reclamation Act that apply to "non-Federal lands." This creates an ambiguity in that non-Federal lands subject to those provisions would consist of "lands within a state" and "Indian lands." The issue as to whether or not this would revive the provisions of Section 710 of the Act relating to Indian lands is not clear because part of the cited portions which are to apply under Senate Bill 2879 refer to Section 710 of the Surface Mining Control and Reclamation Act of 1977. This ambiguity would be cleared up completely if line 8 on page 4 were to read "apply to lands within a State within the meaning of the Surface Mining Control and Reclamation Act of 1977."

Westmoreland would also like language changes to the Bill in Section 7(a) and Section 7(c). On page 10 of the Bill, line 14 should read "Indian Reservation Lands." On line 23, the language should read "operations on Indian Reservation lands under a Federal Indian lands program." On page 12 of the Bill, line 23 the language should read "Indian Reservation Lands." These changes would make it clear that these provisions related to those "Indian lands" which are within reservation boundaries.

Thank you for the opportunity to comment on the Bill. I will see that whatever memorandum is agreed by the Tribe and DSL is delivered to you early next week. I hope the discussion we have held will resolve the objections that the Tribe and DSL have to the Bill in a way which will be acceptable to the Committee.

Very truly yours,

George J. Miller

George J. Miller

GJM:als

Enclosure

LAND OWNERSHIP AND SURFACE MINING REGULATION IN THE CROW CEDED AREA

The Crow Ceded Area is that area of land between the north boundary of the Crow Indian Reservation and the Yellowstone River, comprising portions of Big Horn, Yellowstone and Treasure Counties in southeastern Montana. This land was ceded to the United States by Act of Congress in 1904, and opened for white settlement. Individual Indians living on alloted land were given the option of selling their land and moving to the diminished reservation, or maintaining their property rights. With some exceptions, rights to minerals other than coal were transferred to white settlers. Rights to coal were not deeded in most areas with known coal reserves, but many surface patents included coal rights as well. Surface and mineral rights in Sections 16 and 36 of each township were transferred to the State of Montana as "school sections".

In 1958, Congress restored all unpatented lands in the Ceded Area to Crow Tribal trust status. The United States has considered this transfer to include unpatented mineral rights, including coal. Present surface ownership in the Ceded Area is summarized below:

Fee	1,046,735 acres
State	41,844 acres
Allotted	17,008 acres
Tribal	8,978 acres

Mineral ownership in the portion of the Ceded Area where there are known coal reserves and present mining activities is extremely complex. It would be virtually impossible to define a mining unit in this area which did not include severed Tribal coal. Scattered parcels of Tribal surface exist in some areas, but in no case could a mine operation be limited to such lands. Furthermore, it is not difficult to see how severed Tribal coal, private fee coal, unsevered Tribal coal and State coal might all be included within a single mine operation.

There is one active surface coal mining operation in the Crow Ceded Area. Westmoreland Resources, Inc. holds the Tract III Crow Indian Lease, as well as several adjacent private and State of Montana leases. Coal is currently produced from the Crow and State leases; all Crow coal underlies fee surface owned by Westmoreland (see map). Since the Absaloka Mine was opened in 1974, the State of Montana has regulated mining and reclamation operations. The Bureau of Land Management, in cooperation with the Bureau of Indian Affairs, reviews and approves mining plans, and routinely inspects the mine to assure that coal recovery is maximized for the benefit of the Crow Tribe. Recently, the Office of Surface Mining has asserted regulatory authority on the Indian lease under Section 710 of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), on the strength of the Indian Lands definition of Section 701(9).

As a result, Westmoreland is subject to dual regulatory authority, including dual permitting and dual enforcement. The State of Montana has provided government services since the 1904 cession, and continues to claim regulatory jurisdiction outside reservation boundaries. This claim is valid because Section 710 of SMCRA states that nothing in this Act shall affect existing jurisdictional relationships. OSM, on the other hand, interprets the present definition of Indian Lands to include severed mineral estates outside reservation boundaries. Clearly, for the purpose of regulating surface mining, these lands cannot be both "Indian Lands" and "lands within a state" as defined in Section 701 of SMCRA.

Clearly, SMCRA contemplated a single regulatory authority for a mine, based on the definitions of "Federal Lands", "lands within a state" and "Indian Lands" (Section 701). Furthermore, if jurisidction over Indian proprietary interests were to rest with the Tribe, the Tribe and the State would have exclusive jurisdiction over different portions of a single mine operation. Such a situation could result in very different standards for different areas within the same mine, creating extreme difficulty for the operator since it would be impossible to plan and execute a standardized reclamation plan. Dual regulatory authority over the same land creates obvious problems, such as dual permitting, dual enforcement, dual bonding and the potential for conflicting performance standards.

Jurisdictional disputes and dual regulation in the Ceded Area are inevitable unless regulatory authority remains with the State of Montana. Extending Tribal jurisdiction based on property ownership alone is sure to create a multitude of conflicts where land and mineral ownership is so diverse. The purpose of SMCRA was to require reclamation of lands disturbed by surface coal mining. This statute was not intended to act as a vehicle for extension of Tribal jurisdiction beyond reservation boundaries. Tribal jurisdiction over surface mining should be restricted to lands within reservations so as to avoid the conflicts inherent in dual regulation of the same aspects of mining and reclamation.

PREPARED TESTIMONY OF DENNIS HEMMER, COMMISSIONER
MONTANA DEPARTMENT OF STATE LANDS

I. INTRODUCTION

In 1973, when it appeared that large scale coal mining would soon take place in the state, the Montana Legislature passed the Montana Strip Mining Underground Mine Reclamation Act. That act was generally recognized as one of the toughest strip mining laws in the nation. On April 1, 1980, Montana became the second state in the nation to gain Department of the Interior approval of its permanent coal regulatory program under the Surface Mining Control and Reclamation Act (SMCRA). Under the Montana act the Department of State Lands is regulating coal mining on six major (over 1,000,000 tons per year) and seven small coal mines in the state.

Because coal mining is occurring on the off-reservation Crow ceded area and because mining may soon take place on the Crow Reservation, Montana has an interest in Indian lands legislation. A representative of the Department of State Lands testified at the Indian lands oversight hearing conducted by the House Committee on Interior Insular Affairs Subcommitte on Energy and the Environment on March 19, 1984. Although the Department did not appear at the August 10, 1984 hearing on S. 2879 because it was not placed on the witness list, most of the concerns Montana raised on March 19 have been addressed in S. 2879. The Department wishes to thank Senator Melcher for taking on the task of developing Indian coal mine reclamation legislation and for his willingness to consider the concerns of the state in drafting S. 2879.

S. 2879 also would confer substantial benefits on Indian tribes. It would authorize tribes to regulate coal mining on their reservations and would provide the tribes with certain regulatory program options not available to states. For example, it would authorize partial tribal regulatory programs and tribal participation in federal regulatory programs. It would also allow 100% grants to the tribes for their regulatory programs. The bill recognizes the historic immunity from suit enjoyed by Indian tribes and contains special conflict of interest provision recognizing the unique nature of Indian tribes governmental and proprietary interests.

Another major benefit to the tribes is that it would allow the tribes access to the abandoned mine lands (AML) monies. Again, tribes are given options not available to states. The bill would allow the tribes to have abandoned mine lands programs without regulatory programs. It provides that Indian AML monies are to be placed in interest bearing securities. Finally, it expands the uses which the tribes may make of the AML monies to non-AML purposes, such as the development of expertise in the technical, scientific, administrative, and judicial aspects of a coal mine regulatory program.

All in all, S. 2879 blends the interest of state and tribal governments to create a workable scheme for regulation and abandoned mine land reclamation on Indian lands.

Because state regulation of Indian lands off-reservation has been questioned, the Department wishes to present its rationale in support of this jurisdiction. Also, the Department is proposing several minor amendments to the bill.

II. OFF-RESERVATION REGULATION

In 1904, the Crow Tribe ceded to the United States 1,114,565 acres from the northern portion of its reservation. The act of cession removed the ceded area from the reservation. Shortly after the 1904 cession, the United States opened the ceded area to settlement by non-Indians. The government holds some coal on the ceded area in trust for the Crow Tribe. The amount of federal coal, including that held in trust for the tribe, is currently in dispute in federal court. The state claims that the trust mineral ownership is minimal. The United States and the Tribe claim almost all the coal. There are 42,000 acres of state school trust land including minerals in the ceded area.

Westmoreland Resources, Inc. currently operates the only mine on the ceded area. It has leases with both the state and federal governments. Westmoreland has operated under a Montana permit since 1973. Pursuant to the federal mineral lease, the Secretary of the Interior also has reviewed Westmoreland's permit applications.

Of the 4,617 residents of the ceded area in 1980, only 46 were Indian. Surface ownership was 93.9% fee, 3.7% state 1.5% allotted, and .1% Tribal. Governmental services are provided by state government, three counties, one town, four high school districts, five elementary school districts, three soil and water conservation districts, three irrigation districts, one water and sewer district, four fire districts, one sewer district, and several cemetary districts. All these governmental units are organized under state law and supported by federal, state and local tax revenues. Surface drainage from the ceded area travels north away from the Reservation and into the Yellowstone River. The Crow Tribe has never exercised governmental jurisdiction or provided governmental services in the ceded area.

Therefore, from the standpoint of impacts on government and people, the ceded area does not differ from any other non-reservation area in Montana. Mining on the ceded area will affect non-Indians almost exclusively. Adverse effects of mining must be remedied by state and local government. Given these responsibilities the State of Montana should continue to regulate coal mining on the ceded area.

There exists another important policy reason for state jurisdiction on the ceded area. In Montana, the major strip mines cover such a large area that they extract both federal and non-federal coal. Were there no mechanism for state regulation on these federal lands, each major mine in the state would be subject to both state and federal permitting inspection and enforcement. However, Section 523(c) of SMCRA authorizes the state to enter into cooperative agreements with the Secretary and to regulate mining on federal lands. Montana has a cooperative agreement and the permitting of all mines is done under the Montana permanent program.

The ceded area contains many acres for which both surface and mineral are non-Indian. Montana has undisputed jurisdiction over these tracts. The affect of authorizing tribal regulation on the ceded area would be to introduce duality of administration similar to the duality that Congress sought to avoid by adopting section 523(c). The result of this duality could be impairment of coal development on off-reservation Indian lands.

Section 4(a) of S. 2879 would eliminate this possibility by providing that Indian lands outside the exterior boundaries of a reservation are subject to the provisions of Title 5 of SMCRA that apply to non-federal lands. This would provide that the same regulatory program that is applicable to all off-reservation state, federal, and private lands is applicable to the ceded area. Montana urges the committee to adopt this approach.

At the August 10 hearing, Mr. Tom Fredericks, an attorney representing the Crow Tribe, suggested that the Committee add to S. 2879 language which would state that nothing in the bill is intended to affect the litigation involving the imposition of Montana's severance tax. This language could be used by the Crow Tribe's attorneys to argue that Congress had overruled the United States Supreme Court case law which holds that the provision of governmental services provides a grounds for imposition of taxes. Montana recommends that no language regarding the severance tax litigation be inserted in the bill.

Several persons who testified at the August 10 hearing pointed out that the term "non-federal lands" contained in section 4(a) refers to both "lands within any State" and "Indian lands." Montana agrees that the reference to "non-federal lands" in section 4(a) should be changed to "non-federal and non-Indian lands" or "lands within any State." Although the section does provide for state regulation off-reservation, the amendment would eliminate the potential for future litigation on the issue.

Furthermore, several other sections should be amended to eliminate the possibility of misinterpretation of Congressional intent. On page 10, lines 14 and 23, the word "reservation" should be added after the word "Indian" and on page 10, line 23 the word "Indian" should be added after the word "Federal." These changes would insure that federal Indian lands programs apply only to on-reservation Indian lands. Similarly, the word "reservation" should be added on line 23 of page 12 after the word "Indian." This would insure that section 9(b) is not interpreted to give tribal courts jurisdiction to impose civil penalties and sanctions on persons engaged on surface coal and reclamation operations on off-reservation Indian lands.

III. ALLOCATION OF ABANDONED MINE LAND MONIES

Section 4(a) provides that Indian lands outside the exterior boundaries of the reservation shall be subject to the same provisions of Title 4 as are applicable to non-federal lands. Because section 402(g)(2) provides that 50% of the funds collected on an Indian reservation shall be allocated to that Tribe and because a federal district court has interpreted the term "Indian reservation" to include off-reservation "Indian lands," it is important that the amendment to section 4(a) suggested above be made.

The Crow Tribe has indicated in its testimony that 50% of AML fees collected on off-reservation Indian lands should go to the state and 50% to the tribe.

IV. ACCESS TO COURTS

Section 10(a) provides that any person having any interest which is or maybe adversely affected may commence a civil action against the Secretary to compel compliance with the act if the tribal regulatory authority has failed to perform any act or duty which is not discretionary and for which the Secretary bears oversight responsibility. If the complainant is successful, the Secretary must take affirmative action to correct the situation, including application of sanctions against the tribe. Section 10(b) provides that any person having an interest may bring an action to compel compliance or for damages under the procedures provided in section 520 of SMCRA. Although section 10(b) does not indicate against whom the action may be filed, I assume that the action for compliance or for damages is to be brought against the operator. Because the section does not specifically indicate that a tribe which is an operator may be sued, section 10(b) does not waive a tribe's sovereign immunity from suit when it is an operator.

If a tribe wishes to become a regulator or an operator of a coal mine, it should be required to waive its immunity from suit. If, however, Congress chooses to retain immunity from suit, then I think it needs to consider several situations which are not addressed by section 10 as it currently reads.

First, section 10 does not appear to give a remedy to a person who suffers personal injury or property damage from a coal mining operation run by a tribe. If the person suffering injury or damage is not a member of the tribe conducting the operation, then, in addition to not having recourse through the court system, that individual also has no recourse through the political system. I suggest 10(b) be amended to clarify that it is applicable to violations by an operator and to provide that the damages may be recovered against a tribe when it is an operator.

Second, section 10(a) provides that the Secretary may be sued for any non-discretionary duty of the tribe "for which the Secretary bears oversight responsibility." My assumption is that the Secretary bears oversight responsibility over all aspects of a tribal program and may withdraw its approval of a tribal program for failure to enforce the program as it can do for a state under section 521(b) of SMCRA. For purposes of clarification, I suggest that the committee report reflect that this is the case.

The Secretary is authorized to apply "whatever santions he may deem appropriate or necessary" in order to ensure compliance with the tribal regulatory program. Because the tribe is immune from suit, the Secretary would be required to resort to such sanctions as the withdrawal of technical or administrative assistance or the withholding of federal funds. I suggest that the committee's report affirm that this is one of the sanctions that is available to the Secretary.

Finally, SMCRA contains many administrative functions for which an administrative hearing and judicial appeal is provided. Examples are the issuance, renewal, suspension, and revocation of permits, the release of bonds, the issuance of abatement and cessation orders, and the imposition of civil penalties. For only one of these, the imposition of civil penalties, does S. 2879 expressly contain the same procedural requirements as are contained in SMCRA. This would presumably require an administrative hearing with an appeal to tribal court. Section 9(d) then provides as follows:

> Any final tribal court judgment rendered under the provisions of this Act shall be appealable to a district court of the United States. Review of tribal court judgments shall be de novo and subject to the standards set forth in section 706(2) of title 5, United States Code. (emphasis applied)

Although this paragraph appears on its face to apply to all tribal court judgments, it has been placed in the section dealing with imposition of civil penalties. I suggest that subsection (d) be placed in a separate section so that it is clear that de novo review in federal district court of all tribal court judgments is available. Furthermore, Montana suggests that the underlined language above be eliminated so that federal review is truly de novo review rather than a review of the record developed by the tribal court. In addition the State of Montana suggests that this new section include a provision which specifically provides operators and affected persons with the same rights to administrative and judicial review as are provided in SMCRA. The State of Montana, therefore, suggests that the new section read as follows:

> The tribal regulatory program must include the same administrative hearings and judicial appeals from tribal regulatory authority decisions as are provided by the Surface Mining Control and Reclamation Act (30 U.S.C. 1201-1328) for state regulatory authority decisions. If a partial tribal regulatory program does not include an administrative hearing and judicial appeal process, tribal regulatory authority decisions shall be subject to the same procedures as are provided by the Department of the Interior, Office of Surface Mining pursuant to federal programs. Any final tribal court judgment rendered in review of a tribal regulatory program decision shall be appealable to the District Court of the United States. Review of tribal court judgments shall be de novo.

V. DEFINITION OF INDIAN LANDS

Section 701(9) of SMCRA defines Indian lands as follows:

> All land, including mineral interests, within the exterior boundaries of any Federal Indian reservation, notwithstanding the issuance of any patent, and including rights-of-way, and all lands including mineral interests held in trust for or supervised by an Indian tribe.

With regard to lands located within the exterior boundaries of an Indian reservation, this definition quite clearly includes severed surface and severed mineral estates. However, a dispute has arisen between the State of Montana and the Office of Surface Mining as to whether the term "Indian lands" includes off-reservation severed estates. The Office of Surface Mining concludes that severed estates are included. Montana argues that they are not, in part because Congress eliminated the commas surrounding the phrase "including mineral interests" in the portion of definition dealing with off-reservation lands. By deleting the comma at page 3, line 4, Congress would be introducing ambiguity into the portion of the definition about which there is no dispute. In order to make the definitions in SMCRA and S. 2879 identical, Montana suggests that a comma be inserted on page 3, line 4, following the word "interests."

Because S. 2879 does not use the term "Indian lands" as a term which determines jurisdictional authority, there is no need to resolve the ambiguity created by the off-reservation definition of "Indian lands."

VI SUMMARY

The State of Montana commends Senators Melcher and DeConcini for their efforts in the drafting and introduction of S. 2879. Montana urges that S. 2879 be passed with the following amendments:

1. Page 3, line 4
   Following: "interests"
   Insert: ","
2. Page 4, line 8
   Following: "to"
   Strike: "non-Federal lands"
   Insert: "lands within any state"
3. Page 10, line 14
   Following: "Indian"
   Insert: "reservation"
4. Page 10, line 23
   Following: "Indian"
   Insert: "reservation"
5. Page 10, line 23
   Following: "Federal
   Insert: "Indian"
6. Page 12, line 23
   Following: "Indian"
   Insert: "reservation"
7. Page 13, lines 4 through 8
   Strike: all of paragraph (d)
   Reletter subsequent paragraph

   Page 13, following line 15
   Insert: "JUDICIAL REVIEW

   Sec. 10. The tribal regulatory program must include the same administrative hearings and judicial appeals from tribal regulatory authority decisions as are provided by the surface Mining Control and Reclamation Act of 1977 (30 U.S.C. 1201-1328) for state regulatory decisions. If a partial tribal regulatory program does not include an administrative hearing and judicial appeal process, tribal regulatory authority decisions shall be subject to the procedures as are provided by the Department of Interior, Office of Surface Mining pursuant to federal programs. Any final tribal court judgment rendered in review of a tribal regulatory program decision shall be appealable to the District Court of the United States. Review of tribal court judgments shall be de novo."

Renumber subsequent sections.

8. Pages 13 and 14
Following: Page 13, line 16
Strike: All of Section 10
Insert: "A tribal regulatory program shall provide that the tribal regulatory authority and tribe may be sued to the same extent as a state pursuant to section 520 of SMCRA."

or

Page 14, line 10
Following: "Act"
Insert: "against any person other than an Indian tribe"

Page 14, line 10
Following: "damages"
Insert: "against any person, including the Indian tribe"

Furthermore, the State of Montana recommends that the record on S. 2879 contain the following clarifications of Congress' intent in passing S. 2879:

1. Clarify that the duties of the tribal regulatory for which the Secretary has oversight responsibilities are all nondiscretionary duties that SMCRA requires of the regulatory authority.

2. Clarify that the sanctions which the Secretary may impose under section 10(a) include withholding of technical or administrative assistance and federal funds.

Thank you for the opportunity to submit testimony.

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**Joint NCA/AMC Committee
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May 23, 1983

Mr. James R. Harris
Director
Office of Surface Mining
U.S. Department of Interior
1951 Constitution Avenue, N.W.
Room #235
Washington, D. C. 20240

Dear Mr. Harris:

The accompanying attachment is an initial step in an attempt to address the major concerns of the coal industry in the development of an Indian Lands Program. At the outset, we readily concede that this is an exceedingly complex and controversial area which requires a great deal of careful consideration and a willingness to seek a solution to the significant concerns of all the parties involved.

Unfortunately, studies up to now, including the CERT report, have been seriously defective and therefore have provided an inadequate basis for formulating a legislative program. Among other things, they fail to identify or come to grips with the complicated jurisdictional aspects attendant to an Indian Lands Program and the adequacy of the existing Indian governmental structure as it relates to the development of a complicated administrative mechanism which is essential for an effective Indian regulatory program.

It is the contention of the industry that there are several basic points which must be addressed before an Indian Lands Program can be formulated since they provide the foundation upon which the program must be constructed.

It is also our view that implementing legislation must be enacted prior to the issuance of any regulations by OSM on Indian lands. Also, the definition of Indian lands must be sufficiently defined so that it provides a workable and predictable area as to which the Indian Lands Program will apply.

Continued . . . .

These points along with those addressing the mechanism for the program's functions, such as jurisdiction over non-Indians and enforcement, administrative and judicial review, sovereign immunity, conflict of interest, federal funding of tribal programs, areas unsuitable, federal oversight and existing permits are contained in the attachment.

We would like to further caution that industry's ultimate position on any legislation providing for an Indian Lands Program will need to be reviewed in light of changes to the Indian Lands Mineral Leasing regulations now under consideration by the Department of the Interior. While the leasing rule changes have not yet been formally proposed, early drafts raise some question about the extent of authorities that would result from the combined changes in a Surface Mining Control and Reclamation Act (SMCRA) Indian Lands Program and the new leasing regulations.

The approaches developed in this initial document are, admittedly, quite brief. Therefore, should you require any further information or desire any explanations, please feel free to contact us.

Sincerely,

Robert W. Long
Robert W. Long
Vice President
American Mining Congress

William E. Hynan
William E. Hynan
Senior Vice President
National Coal Association

Attachment

cc: William Johnson
William Schmidt

Indian Lands Program

Legislation to provide for an Indian Lands Program should be a separate act or a separate section of SMCRA modifying SMCRA by general reference; it should not be a line-by-line rework of SMCRA. Under such Indian Lands legislation, OSM should set up and enforce the Indian Lands Program under similar criteria as the Federal Lands Program until the various tribes are authorized to take it over for themselves. In no event should OSM set up any program in the absence of legislation authorizing an Indian Lands Program. In any proposed legislation the following items should be addressed:

1. Definition of Indian Lands. The definition should be changed to read as follows: "Indian Lands means all lands within the exterior boundaries of any federal Indian reservation as defined by treaty, act of Congress, or Executive Order." This definition retains only the on-reservation lands definition of current Section 701(9). Tribal jurisdiction is thus limited to reservation lands. Such a limitation eliminates jurisdictional controversies arising on off-reservation lands, at least between tribes and states, and is most consistent with the state of the law on tribal territorial jurisdiction. There should be a specific provision dealing with the respective jurisdiction of the Navajo and Hopi Tribes within the former joint-use area.

2. OSM Proposed Permanent Program. Within a specified period of time after enactment of legislation, the Secretary, after consultation with the tribes, must develop and implement regulations for an Indian Lands Program which include:

- A permit program for Indian lands.
- An enforcement program for Indian lands.
- Requirements for the preparation, submission and approval of tribal regulatory programs.

OSM will set up and administer the Indian Lands Program so as to parallel (as far as practicable) the Federal Lands Program, until the tribes are authorized to take it over for themselves. OSM shall implement this program after consultation with the tribes.

Each tribe wishing to assume partial or full jurisdiction over the regulation of surface coal mining must submit to the Secretary of Interior, through the Office of Surface Mining, a program which demonstrates that such tribe has the legal authority to and the capability of carrying out those provisions of the Indian Lands Program for which jurisdiction is sought. Such programs may be submitted to the Secretary of Interior at any time following promulgation of a Federal Indian Lands Program.

Each tribe wishing to assume partial or full jurisdiction over the regulation of surface coal mining must create by tribal law:

- A coal mining commission or board with the authority and adequate staff and funding to adopt rules and regulations governing coal mining and reclamation operations. The commission or board would also serve as the first level of review for any administrative challenges brought under the tribal program (e.g., permit appeals, challenges to rules, challenges to routine Notices of Violation, etc.) The tribal law creating the commission or board must provide for the adoption of procedural rules or regulations which specify the manner in which coal operators, interested persons, and state governments may comment on proposed actions and may present challenges to final legislative actions of such commission or board. No commission or board member or employee may have a direct or indirect financial interest in underground or surface coal mining operations. Financial interests in coal mining which accrue solely by virtue of tribal membership will not be considered a conflict of interest. Rules and regulations promulgated by the coal mining commission or board must be consistent with the Indian Lands Program developed by OSM pursuant to the implementing legislation and must be approved by the Secretary.

- An agency with sufficient administrative and technical personnel and funding to enable the tribe to regulate, by administering and enforcing the rules and regulations adopted by the coal mining commission or board, those aspects of surface coal mining and reclamation operations for which jurisdiction is sought. No employee of the agency may have a direct financial interest in underground or surface coal mining. Financial interests in coal mining which accrue solely by virtue of tribal membership will not be considered a conflict of interest.

3. Jurisdiction over non-Indians and Enforcement. Jurisdiction over non-Indians should be strictly limited to reservation lands only and such jurisdiction should be limited to civil jurisdiction only. It would be inappropriate to single out coal operators for the extension of criminal jurisdiction beyond that which already exists under present statutes and case law. The question of tribal jurisdiction essentially comes down to what type of regulatory program is adopted by the tribes and how much authority is vested in the tribes under that program. We would propose that criminal sanctions be invoked by referring them to OSM and the Justice Department for prosecution. This is consistent with the present statutory structure regarding Indian criminal jurisdiction. Civil jurisdiction over surface mining would be vested in a

tribal administrative commission or board and agency with review by the appropriate federal district court.

Following approval of the tribal enforcement program, representatives of the tribal regulatory agency may issue Notices of Violation to coal mine operators for violations of the rules and regulations of the coal mining commission or board or any condition of a tribal permit.

Following approval of the tribal enforcement program, representatives of the tribal regulatory agency may issue Cessation Orders to coal mine operators when, in the judgement of the agency, the violation creates an imminent danger to the health and safety of the public or is causing or can reasonably be expected to cause significant, imminent environmental harm to land, air or water resources.

4. Administrative and Judicial Review. After the coal mining commission or board has adopted a rule or regulation, any person may petition the commission or board to amend or repeal the rule or regulation or any part thereof. Any amendments must be approved by the Secretary. The procedural rules or regulations of the commission or board will govern the filing, hearing requirements and public notice associated with such appeals. If the petitioner is dissatisfied with the final decision of the board, the decision may be appealed to the Interior Board of Surface Mining Appeals and then to the appropriate federal district court. Federal law (U.S. Constitution, federal case law, rules of practice and procedure etc.) will govern court review.

An operator issued a Notice of Violation or Cessation Order by the regulatory agency may apply to the coal mining commission or board for a review of the notice or order. Upon receipt of such application, the commission or board shall cause such investigations to be made as it deems appropriate. Such investigations shall provide an opportunity for a public hearing to enable the operator to present information relating to the issuance of such notice or order. The filing of an application for review shall not operate as a stay of any notice or order. A method shall be established to expedite the review of Cessation Orders. Decisions of the commission or board relating to Cessation Orders may be appealed to the appropriate federal district court. Decisions regarding Notices of Violation may be appealed to the Interior Board of Surface Mining Appeals, then to the appropriate federal district court. Civil penalties may be assessed by the coal mining commission or board for Notices of Violation issued by the regulatory authority. In determining the amount of penalty, the commission or board shall give consideration to the operator's history of previous violations, the seriousness of the violation, whether the operator was negligent and the demonstrated good faith of the operator in attempting to achieve rapid compliance after receiving the Notice of Violation.

5. Sovereign Immunity. An Indian tribe must waive its sovereign immunity as to surface mining regulation in order to receive approval to assume jurisdiction over any portion of a coal mining and reclamation regulatory program. This would enable suits to be brought against tribes and tribal regulatory authorities to the same extent that suits may be maintained against the states.

6. Conflict of Interest. There will be included in the Indian Lands Program a provision for federal oversight and loss of program approval if a tribe does not enforce its program adequately and fairly.

7. Federal Funding of Tribal Programs. There should be a provision for federal funding of tribal programs on the same basis as states operating under a cooperative agreement for coal mining on Federal Lands. If appropriate, Abandoned Mine Land (AML) funds, if not used for AML projects, may be used for the administration of tribal programs.

8. Areas Unsuitable. Tribes already have the right to deal with their lands as they see fit and establish the criteria themselves to lease or not to lease. A process pursuant to Section 522 of SMCRA for planning and petitioning is unnecessary. They have existing land use planning processes and they should be permitted to continue to function. The Indian tribes have the right to determine what uses can be made of their lands based on whatever criteria they so decide, and this right should not be limited by the imposition of any areas unsuitable criteria. It is inappropriate to superimpose an areas unsuitable provision on it. Grants have been made to the tribes for land use planning.

9. Federal Oversight. An Indian tribe must show they are qualified and capable of taking over the program and after assuming it, they must continue to enforce it adequately or OSM can take over enforcement of the program just as they could with a state program (Section 504(a)&(b) and 521).

10. Existing Permits. A mining plan or permit approved pursuant to SMCRA shall be accepted by OSM and the Indian regulatory authority as valid for the remainder of the permit term.

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January 31, 1984

Mr. James R. Harris
Director
Office of Surface Mining
U. S. Department of the Interior
Administrative Record (R & I-32)
Room 5315
1100 L Street, N. W.
Washington, D. C. 20240

Dear Mr. Harris:

The Joint National Coal Association/American Mining Congress Committee on Surface Mining Regulations is pleased to submit these comments on the Office of Surface Mining's proposed rules for surface coal mining and reclamation operations on Indian lands. These proposed rules were published in the Federal Register on October 24, at 48 F.R. 49174.

The Joint Committee represents the coal industry on all matters regarding surface coal mining and reclamation. Our cadre of experts represents some of the best legal and technical talent in the industry on those subjects impacting surface coal mining including hydrology, revegetation, cultural resources, permitting, reclamation technology and Indian lands. It is in this capacity, as experts on all facets of the surface mining program, that we present these comments for your consideration.

General Comments

The proposal by the Office of Surface Mining (OSM) to establish a federal Indian Lands Program under the direction of OSM is welcomed by the coal industry as an effort to remedy the regulatory uncertainty that has existed on Indian Lands since enactment of the Surface Mining Control and Reclamation Act (SMCRA). The coal industry has been adversely affected by this confusing regulatory situation and is fully cognizant of the fact that it has been engendered by the inordinate delay which has occurred in structuring a program to address coal mining on Indian Lands. Furthermore, we are very much aware that some of this uncertainty will continue until there is a final resolution to regulation of coal mining on Indian lands as contemplated by Congress in SMCRA.

Even though the causes for delay are numerous and complicated, not the least of which involve far-reaching policy issues, the coal industry contends that something can and must be done immediately to give some direction and focus to the regulation of surface mining on Indian lands. We believe that OSM's proposed interim federal program, if properly structured, does have the potential for eliminating many of the problems that give rise to the uncertainty since it would set up a functioning OSM program on Indian lands. As a result, the Joint Committee will work with OSM to develop the most effective interim program possible recognizing that any final long term solution will require a complete and thorough understanding of the basic underlying issues raised by Sec. 710 of SMCRA.

The development of a program for the regulation of surface coal mining and reclamation operations on Indian lands has taken a rather divergent course since the enactment of the Surface Mining Control and Reclamation Act (SMCRA) in August of 1977. Congress' scheme for the regulation of surface coal mining on Indian lands is set out in Section 710 of the Act and envisions three phases of development. First, a study of the question of regulation of surface mining on Indian lands was to be completed taking into consideration the special jurisdictional status of these lands. Second, a report was to be made to Congress that was to include proposed legislation designed to allow Indian tribes to elect to assume full regulatory authority over the administration and enforcement of regulation of surface coal mining on Indian lands. Lastly, following enactment of Indian Lands legislation by Congress, a permanent regulatory program for the regulation of surface coal mining on Indian lands was to be developed by OSM that provided an opportunity for the Indian tribes to administer the program where appropriate. During the interim, Section 710 provided for certain provisions of SMCRA to be applicable to coal mining operations on Indian lands pending adoption of a final regulatory program.

In our view, OSM is deviating from this Congressionally-contemplated sequence by proposing its Indian lands rules at this time. We believe that ignoring the Congressional sequence set forth in Section 710 results in a failure to come to grips with the important, all-encompassing issues that attend the regulation of surface mining on Indian lands. Some of these are: the jurisdiction of the tribes (both civil and criminal) under an Indian lands program; sovereign immunity; the operation of tribal courts and regulatory agencies; the protection of constitutional rights; the definition of Indian lands; the role of the states; and Indian conflict of interest. Admittedly, OSM recognizes the need to end the regulatory confusion pending the long term legislative resolution of regulation on Indian Lands. However, to the extent that the proposed regulations have preceded the Section 710 study and the resolution of those issues, the Joint Committee believes these regulations should be limited in their scope and effect until such time that those issues are adequately considered and resolved.

We urge the agency to limit its rulemaking to those provisions of SMCRA specifically set forth in Section 710(c) and (d) of the Act. In the proposal, OSM has taken the opportunity to expand the scope of its rulemaking beyond these latter provisions and into such areas as permitting under Section 506 of the Act and enforcement pursuant to Section 518. We believe such extensions to be wholly unwarranted and without statutory support. Should OSM continue to pursue these and other aspects of the proposed rules, it is essential that the agency detail its support and authority therefor.

As a matter of primary importance is OSM's preamble to the proposed rules which is woefully inadequate in explaining the basis, purpose, and statutory authority for many aspects of the proposal. OSM must undertake the effort to explain these matters. This is an exceedingly complex rulemaking with significant ramifications for both the coal industry and the Indian Tribes. There is almost no discussion of what lands are to be included in the definition of "Indian Lands". In addition, we believe there are significant aspects of the federal permanent program regulations that, in fact, are not applicable to Indian lands. However, because of OSM's blanket incorporation by reference of the permanent program rules, many of the inapplicable regulations are concealed throughout the proposal. Just one example is the apparent applicability of the term "public roads." OSM's failure to set out and discuss the full range of permanent program regulations that are incorporated by reference will more than likely lead to many confusing results. In any event, it must be recognized that this proposed regulatory program, if finalized, will not resolve several of the significant problems and issues attending the regulation of surface coal mining on Indian lands.

Throughout the proposed rules, OSM extensively incorporates its recently revised permanent regulatory program by reference. However, in the review of the proposed rules it is necessary to correlate all of the revised regulations with the previous rules to determine what is in force and effect and what becomes part of the proposed federal program for Indian Lands. Therefore, review of the new comprehensive regulatory program for Indian lands is extremely difficult and time consuming. Identification of the problem areas must be done now or serious disruption could result once the Indian lands rules are in place since major operational considerations regarding environmental performance standards and design criteria must be viewed in light of the new regulatory program. As a result, the Joint Committee urges OSM, in the preamble when the program is promulgated, to make clear what regulations, as revised, are part of the program and to provide the full text of these regulations, as revised.

We might note here that even if OSM provides the text of the revised regulations, further questions regarding the application and effectiveness of the rules will ensue as a result of the extensive litigation on OSM's revised permanent program rules. A resolution of all of those issues, of course, is not expected until the fall of 1984. All in all, the Indian lands program is likely to be in a state of flux for some time.

Another generic issue identified by the Joint Committee with OSM's proposed rules is the somewhat confused role of the states in the regulation of coal mining on Indian lands. At page 49175 (48 F.R.) of the preamble to the proposed rules, OSM states that "these proposed regulations would not grant, endorse, or revoke any State or tribal jurisdiction over mining on Indian lands that may have existed prior to passage of the

Act." At page 49178, however, OSM remarks: "OSM proposes to make Sec. 843.14(d), with regard to notifying State regulatory authorities of notices and orders issued by the Department, inapplicable on Indian lands since no State regulatory authority would have jurisdiction over Indian lands." It is the industry's position that OSM should assume exclusive jurisdiction within Indian reservations. Within reservation boundaries, the definition of "Indian Lands" clearly applies, regardless of land ownership. Outside reservation boundaries, however, the intent of the definition is not clear. Until and unless the definition of "Indian Lands" is clarified by Congress, regulatory jurisdiction should remain with the states where there is an approved permanent program. Only in this way can jurisdictional conflicts and duality of regulation be avoided.

In crafting a regulatory program for Indian lands, the Joint Committee recommends that OSM give serious consideration to the adoption of a "Special Indian Lands Provision" that would permit any Secretarially approved standard applicable to lands adjacent to Indian lands to be applicable on Indian lands if approved by the regulatory authority. OSM specifically requested comments on the development of specific provisions unique to Indian lands in general or to specific Indian lands. We believe this concept will address both situations. The Secretarially approved standard already takes into account the unique terrain and other conditions of the particular area and this provision would allow these standards to be applicable to adjacent Indian lands which are in similar terrain.

As we envision it, this Special Indian Lands provision would provide for the adoption of rules in the approved permit that would take into account the Secretary's approved regulations on adjoining state or federal lands, including lands covered by state cooperative agreements. In particular, we believe it is likely that many of the same provisions that have been built into state programs through operation of the state window concept would be equally applicable to permits for mining on Indian lands within those states--for instance, the provision in the New Mexico state program that recognizes the unique value of escarpments for wildlife habitat could be equally applicable to Indian lands within the state. We urge OSM to consider such a provision and suggest that language similar to the following be included in the Indian lands rules: "At the option of the operator the processing of a permit application on Indian Lnads shall be governed by the rules applicable to adjacent lands under an approved program in lieu of the rules referenced in (c)(1) and (c)(3)." This approach will also provide consistency with the standards on adjoining lands.

Specific Comments

(1) Section 701.11 (c)(1) -- Re-permitting

In Sec. 701.11(c)(1) delete the words "...within two months" and add the following: "unless an application, which already addresses the Sections of the Act referenced in Section 710(d), has been submitted no later than two months from ..."

This provision sets forth the procedure for re-permitting surface coal mining operations on Indian lands subsequent to the effective date of these regulations and requires that an operator submit a permit application pursuant to these rules within two months after the effective date of the rules in order to continue mining. We believe this is an unrealistic and impractical requirement and is symptomatic of the confusion that exists with respect to the current status of mining approvals on Indian lands.

Currently, most (if not all) operations on Indian lands hold authorizations requiring compliance with permanent program requirements to mine on Indian lands. In some cases, operators are in the process of obtaining new or modified SMCRA authorizations. In every instance, however, the existing authorizations to mine held by coal operators on Indian lands address all of the provisions set forth in Sections 710(c) and (d) of the Act, which include standards, application requirements, reclamation plans, etc. Thus, the re-permitting scheme set forth in Section 710.11 is essentially meaningless and certainly unnecessary.

OSM seems to believe that a re-permitting procedure is necessary in order to assure compliance by operators with the performance standards set forth in Section 710 of the Act. As mentioned above, this requirement has already been met in the existing authorizations to mine. Thus, OSM has no basis for imposing on operators the elaborate, time consuming, costly and excessive re-permitting process proposed in its rules.

The purpose of the change is to recognize that many Indian lands operators have already submitted applications or received permits under SMCRA pursuant to either a federal lands program or federally approved state programs. These applications already address the Sections of the Act referenced in Section 710(d) of SMCRA, so no additional application is necessary. Further, if a permit has been granted, the Secretary must necessarily have carried out his responsibilities under Sections 710(c) and (d) and Section 710(f) so no additional review and approval is needed.

We believe the suggested approach would provide a mechanism whereby an operator need only reference his existing authorization to mine (i.e. in most cases, a SMCRA authorization obtained from OSM and/or the state) in the document filed within two months of the effective date of the rules. OSM would then review that authorization as required by Section 710(f) to assure that it addresses all of the performance standards set out in Sections 710(c) and (d) -- which is the extent of OSM's authority. Such a process reflects the reality of the current situation on Indian lands and would avoid an otherwise unnecessary and excessive exercise. Our approach would also be more reasonable and flexible while at the same time providing OSM with the same assurances that the more elaborate proposal would.

Note: Section 750.11(c)(1) contains these same problems and must be similarly modified.

(2) Section 750.5 -- Definition of "Regulatory Authority"

Although OSM defines the regulatory authority to be OSM, there are still a number of lingering questions regarding the role of the states on Indian lands, which are evident both throughout the preamble and in anticipation of application of the rules. This question of jurisdiction must be resolved by OSM prior to promulgation of these rules. Confusion and overlapping jurisdiction must be eliminated. It is the industry's position that OSM should assume exclusive jurisdiction within Indian reservations. Within reservation boundaries, the definition of "Indian Lands" clearly applies, regardless of land ownership. Outside reservation boundaries, however, the intent of the definition is not clear. Until and unless the definition of "Indian Lands" is clearified by Congress, regulatroy jurisdiction should remain with the states where there is an approved permanent program. Only in this way can jurisdictional conflicts and duality of regulation be avoided.

(3) Section 750.5 -- Definition of "Minerals Agreement"
Section 750.11(b) - Permits

A definition of "minerals agreement" in Section 750.5 and the inclusion of minerals agreements, leases and licenses in Section 750.11(b) should be deleted from these regulations. All of these documents are covered by other detailed rules and regulations and are based on statutes other than SMCRA. Enforcement of any of the provisions of these documents are adequately covered by the authorizing statutes. Inclusion of these documents in these regulations so that they can be enforced through SMCRA is unjustified and unwarranted. There is no preamble support or justification for including these documents under SMCRA enforcement as an overlay on top of the existing statutory mechanism already in place and operative.

(4) Section 750.12(a) -- Fees

It appears that the fee requirements in this section go far beyond those set forth in or contemplated by SMCRA -- especially insofar as fees for revisions and renewals are concerned. The Act limits fees to initial permit applications only. To add additional fees on Indian coal will only lessen its competitive value with other coals in the market place. In fact, the initial permit application fee should be made comparable to those of the states in the area. We certainly feel it incumbent on OSM to publish a schedule as to how the permit fee is to be calculated.

(5) Section 750.12(d)(2) -- Informational Requirements

These informational requirements should be eliminated. To our knowledge there is no statutory authority for requiring this information. In any event, OSM has failed in its preamble to set forth such authority and must do so in order to continue its insistence on the submission of this information. These informational requirements also appear to go behond those for permanent program permit applications. We are unaware of any similar requirements for any other permit application. Such information is not required in non-Indian land permit applications and therefore should not be necessary for Indian lands permits.

Furthermore, OSM should know that it will be extremely difficult to accumulate this information within two months of the effective date of the rules should they become final. Finally, in our view, the accumulation of this information is the responsibility of OSM. The most the agency should be able to do, therefore, is to come to an operator for assistance in preparing the information. To make such an accumulation the mandatory duty of operators will require statutory authority which, so far, OSM has failed to provide.

(6) Section 750.17 -- Bonding

This section should make it clear that no operator can be required to provide bond for more than one regulatory authority.

We merely wish to point out here that the bonding requirements could pose significant problems where there are two regulatory authorities. As we have previously stated, we are uncertain that OSM has effectively resolved the potential for dual regulatory authority, and we urge attention to this matter.

(7) Section 750.11(d) - Permits

[Add New Section 750.11(d)] "Where an operator's surface coal mining and reclamation operations include both Indian lands and other lands, permit review will be conducted concurrently by the Indian lands regulatory authority and any other responsible authority. All reasonable efforts will be made to insure that permit approvals are as similiar as possible and that review and renewal time periods are equivalent between authorities."

As mentioned above, the OSM Indian Lands Program should include only the sections of SMCRA referenced in Sec. 710 of the Act which does not include, for example, permitting. However, if such a mechanism is to be adopted, the above language is necessary to cope with dual jurisdiction. There is no allowance under the proposed rules for a cooperative agreement to simplify dual regulation. The language above is intended to insure that the resulting dual permit review and enforcement is as similiar as possible. The need for such cooperation is stated in Section 503(a)(6) of SMCRA. Although this section refers to state programs, the required cooperation can be implemented only if federal programs have similar provisions.

(8) Section 750.12 (c)(4) - Permit Applications

[Add in Sec. 750.12(c)(4)] "At the option of the operator the processing of permit applications on Indian Land shall be governed by the equivalent rules applicable to adjacent lands under an approved program in lieu of the rules referenced in (c)(1) and (c) (3)".

An operator should be permitted to have equivalent rules from approved programs on adjoining lands applicable to his permit application (See discussion above).

(9) Section 750.16 -- Performance Standards

[Add following underscored language at Sec. 750.16]

"Surface coal mining operations on Indian lands shall be conducted in accordance with Parts 816; 817; 819; 822; 823; 824; 826; and 828 of this chapter or the equivalent rules applicable to adjacent lands under an approved program or a federal-state cooperative agreement."

As recognized by SMCRA at Sections 101(f), 102(g), and 201(c)(a), the implementing regulations are to take into account the "[d]iversity in terrain, climate, biologic, chemical, and other physical conditions..." within a regional area versus implementing national generic standards. Where such regional regulatory differences have already been proposed, tested, and approved through a federal lands program or a federal-state cooperative agreement under an approved state program, they should also be allowed to apply to Indian lands in the same area. This language would constitute a special Indian lands provision per comment request at 48 F.R. 49175. (See discussion above).

(10) Section 750.18 -- Enforcement and Inspection

The Joint Committee is concerned about whether it is clear that the reference to Part 843 in this Section also serves as a reference to 43 CFR Part 4. The latter contains procedural provisions with regard to temporary relief which we believe are essential to an effective and procedurally sound regulatory program. These provisions apply to the federal lands program through its reference to Part 843. They are similarly applicable to Indian lands and it should be made clear that they do in fact apply.

(11) Section 750.20 -- Adoption of Indian Coal Lease Terms

Per Section 750.20, OSM proposes to incorporate into existing leases of coal on Indian lands the entire Surface Mining Control and Reclamation Act of 1977 and "all regulations promulgated thereunder". Since the proposed regulation purports to unilaterally amend negotiated contracts having more than one party, the regulation is not legally defensible. While Congress, by enacting Sections 710(c) and (d), charged the Secretary of the Interior with incorporating certain of SMCRA's requirements into existing and new leases, Sections 710(c) and (d) cannot alone be read to authorize the unilateral amendment of existing leases. Congress could only have intended that the specified SMCRA provisions be incorporated into existing leases in a legally permissible manner (e.g., as part of a negotiated lease amendment or upon lease renewal or as part of a lease requirement) and not by administrative fiat. This intent is underscored in Section 710(f) which requires that the Secretary must approve any changes in the terms and conditions of any existing coal lease required by Sections 710(c) and (d). In addition, there is nothing in the legislative history to suggest that the Secretary is empowered to unilaterally amend existing leases. Insofar as new leases are concerned, it is assumed that the Secretary would enforce SMCRA's requirements as expressed in Sections 710(c) and (d) through the Secretary's authority to approve leases and permits.

OSM also proposes to include and enforce such terms and conditions in addition to those required by Sections 710(c) and (d) of the Act as are requested by the Indian tribes in leases issued after August 3, 1977. We again urge the agency to limit its rulemaking to Sections 710(c) and (d). There is no mention in the preamble discussion authorizing a rulemaking on Section 710(e). We believe such a rulemaking to be ill-considered in view of its far-reaching implications. Congress has not addressed legislation designed to grant the Tribes regulatory authority over surface coal mining on Indian lands. Until the Tibes are given this authority by statute, we believe it is inappropriate to grant them blanket authority to unilaterally incorporate terms and conditions in new leases other than those specified in Sections 710(c) and (d). Moreover, if the agency chooses to go beyond the requirements of Sections 710(c) and (d), much greater detail on its support for such a rulemaking is needed.

(12) Part 755 - Intergovernmental Agreements

Part 755, which permits the Indian Tribes to elect to work with OSM in the administration and enforcement of the proposed federal Indian program, should not be implemented at this time without resolution of the critical issues underlying regulation on Indian lands - such as, Indian jurisdiction over non-Indians (civil and criminal); definition of Indian lands; Indian conflict of interest; etc. The extent of Indian participation in a regulatory program on Indian lands is dependent upon how these issues are resolved.

Furthermore OSM's preamble is deficient in its discussion of the use of intergovernmental agreements in this situation, both with respect to the legal and substantive justification. Merely citing a statute which authorizes cooperative agreements does not explain how they can be used in the context of the proposed regulatory program. The use of such agreements is not authorized by SMCRA. OSM should reexamine the implications involved in utilizing intergovernmental agreements and defer final resolution until the proper jurisdictional role of the Indian Tribes is determined under the Section 710 Study called for by SMCRA.

Conclusion

The Joint Committee appreciates the opportunity to submit these comments and hopes that OSM will give them serious consideration. The entire area of Indian lands regulation and jurisdiction is of critical importance to the orderly development of the rich coal resources that underlay these lands. The Indian Tribes, the Indian mineral owners, coal operators and others who are interested in the development of Indian lands deserve answers to the many difficult issues involved in the regulation of surface mining on those lands. In many respects OSM is a catalyst for securing those answers. However, these proposed rules provide a very limited basis for a resolution of the issues. We trust that OSM is not relying solely on these regulations and will continue to search for additional, more effective solutions. For our part, we stand willing to assist you in your efforts.

Sincerely,

William Hynan
William E. Hynan
Senior Vice President
National Coal Association

Robert W. Long
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STATEMENT ON S. 2879
AUGUST 9, 1984

This statement is submitted by the National Coal Association and the American Mining Congress Joint Committee on Surface Mining Regulations (Joint Committee). It addresses S. 2879, a bill to provide for cooperation between the Secretary of Interior and Indian Tribes with respect to the regulation of coal mining operations on Indian reservation lands and the acquisition and reclamation of abandoned mines on such lands, and for other purposes.

The NCA/AMC Joint Committee represents the coal industry on all matters regarding surface coal mining and reclamation. We represent all of the producers who operate on Indian lands as well as many who are interested in looking into the viability of new development on Indian lands. Our cadre of experts represents some of the best legal and technical talent in the industry on those subjects impacting surface coal mining including hydrology, revegetation, cultural resources, permitting, reclamation technology and Indian lands. It is in our representative capacity and as experts on all facets of the surface mining program that we present this testimony for your consideration.

The Joint Committee is extremely interested in S. 2879 and the development of a realistic and coordinated regulatory scheme on Indian lands. We requested time to testify today but were told that the tight schedule necessitated limiting the witness list to those who had already been selected and that we could submit a written statement for the record. The Joint Committee assures you that our interest and concern is in no way diminished because we were not permitted to testify this morning. With your permission we will submit a brief statement today outlining some of our major concerns and will file a further written statement for the record which will set forth our position in more detail as well as analyze the applicability of the provisions of SMCRA to tribal regulatory programs as required in Section 15 of S. 2879. We also stand ready to work with the Committee members and the staff in formulating statutory language in support of our recommended changes and modifications.

The coal industry has been vitally interested in the development of an Indian Lands Program for the regulation of surface coal mining for several years. We have submitted comments to the Office of Surface Mining (OSM) on its draft report to Congress and on its proposed permanent program regulations for surface coal mining and reclamation operations on Indian lands. We testified before the House Interior Subcommittee on Energy and the Environment on H.R. 4830 and have met with representatives of the Crow, Hopi, and Navajo tribes on two occasions and with the Council of Energy Resource Tribes (CERT). Given our long involvement with active surface coal mining operations on Indian lands, we believe the Joint Committee has the proper perspective to comment on both the legal and practical aspects of an Indian Lands Program dealing with surface mining. As the regulated industry, we also have an important interest in whatever legislative or regulatory mechanism is fashioned for surface coal mining operations on Indian lands.

It is our basic position that any Indian Lands Program should be limited to the lands within the exterior boundaries of the reservations. The Indian lands outside the reservations are such a mixture of ownership and trust interests and so checkerboarded with other lands subject to state and federal jurisdication that the creation of duplicative and overlapping regulatory programs could vitiate the economic viability of the coal reserves under these lands. Further development on Indian lands could be severely impaired when compared with the availability of coal reserves in other areas where there is no comparable regulatory maze with its costly delays and uncertainties. This is not to say that Indian tribes could not participate in the regulatory program on lands off-reservation. However, the mechanism and criteria for such involvement should be carefully set out in the statute.

The Joint Committee also believes there should be de novo review in the federal courts of tribal court administrative action and decisions under an Indian Lands Program. Further, there should be no criminal jurisdiction granted to the Tribes over non-Indians. A limited waiver of sovereign immunity is necessary to provide operators with the same protection and remedies available to them under state programs approved pursuant to the Surface Mining Control and Reclamation Act of 1977 (SMCRA).

There is also a need to structure some protection from the unique conflict of interest situation that attends tribal regulatory programs. Since the Tribes, apart from their ownership, are directly or indirectly involved in mining operations and yet are also regulators under their regulatory program, they would be in the unique position of regulating themselves.

S. 2879 appears to go a long way toward meeting some of our concerns but the bill needs clarification in several critical areas. The intent of S. 2879 clearly seems to be to give the Indian tribes the right to take over regulation of surface mining only within the exterior boundaries of the reservations. Unfortunately, S. 2879 adopts the definition of "Indian lands" contained in SMCRA without modification and it, of course, can be read to include Indian lands outside the reservation. The term "Indian lands" is used throughout the bill and in several particularly critical areas where the meaning intended is clearly restricted to "reservation lands." The reliance on the Indian lands definition and the use of the term in the above-described manner creates considerable confusion and should be corrected in order to leave no doubt as to the meaning intended by Congress. We will provide suggested statutory language to make this correction.

The de novo review provision is an important requirement that will insure consistent interpretation of SMCRA so that operations on Indian lands will be required to meet requirements similar to those enforced on non-Indian lands. Development on Indian lands will not be disadvantaged. Primary jurisdiction is vested in the tribal courts. However, a full appellate system in the federal courts is also necessary. Even in the tribal court system, there should be provision for basic constitutional guarantees. This must be made clear in the statute.

The "partial, phased program" which the Tribes may adopt pursuant to Section 6(a) of the bill for the development of expertise has no real equivalent in SMCRA. It is difficult to ascertain exactly what is intended for this partial program and what standards govern its creation and evaluation. S. 2879 must set these out and we believe that the partial program should not be autonomous but should function as part of the Federal Indian Lands Program under the Office of Surface Mining until a full Tribal Program is in effect.

The cooperative agreements provided for in Section 7(c) which the Tribes may utilize are also significantly different from those spelled out in SMCRA. The latter agreements were essentially a mechanism to permit fully developed and approved state programs to be implemented on federal lands. The S. 2789 cooperative agreements do not implement developed Indian programs, partial or full, but are vehicles for developing a participatory role for the Tribes. However, there are no standards for their creation or evaluation. These cooperative agreements must meet some criteria and the bill must set forth how they are expected to function as part of a partial program. There is some question whether they needlessly complicate the partial program mechanism and perhaps some consideration should be given to limiting the instances in which they can be utilized.

The grant of original jurisdiction to Tribal Courts to impose civil penalties and sanctions and the provision for other Tribal authority designated in an approved Tribal Program provide an effective mechanism to insure compliance with the SMCRA requirements. However, the conflict of interest provision must be restructured to face up to the problems associated with the situation where the Tribe itself is actively engaged in the mining operation or is seeking to become directly involved. In such situations the Tribe, as the regulatory authority, is in a position where it can put the operator at a serious disadvantage. Furthermore, some form of waiver of sovereign immunity must be included to give an operator the same recourse against Tribal regulatory authority that he has under an approved state plan.

Section 14, which requires an archaeological, historical and cultural resource investigation prior to permit approval, would impose an unjustified, overlapping requirement on top of an already existing cultural resource protection program established and defined by six or seven statutes. The program goes back to the Antiquities Act of 1906 through the enactment of the National Historic Preservation Act of 1966 and the Archaeological Resources Protection Act of 1979, and operators are required to comply with all of them. The historic and archaeological resource protection program sets forth a complicated procedure for the protection of significant artifacts and properties through a process of discovery, investigation, evaluation and mitigation. The imposition of a new layer of extensive investigatory procedures to presumably serve the same objective is unwarranted. The additional cost burden and delay could seriously vitiate the economic viability of an existing operation as well as ameliorate the economic potential of a contemplated operation. This section must be deleted. The existing statutory scheme provides more than adequate protection for archaeological and cultural resources.

As was mentioned above, this statement summarizes some of our significant concerns. The Joint Committee will also submit a written statement for the record spelling out in more detail our problems with S. 2879. We hope these statements will be helpful and we will be pleased to provide further comment and assistance to the committee members and staff.

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September 5, 1984

RECEIVED SEP 5 1984

The Honorable Mark Andrews
Chairman
Select Committee on Indian Affairs
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

On August 10 a hearing was held on S. 2879, the Indian Coal Mining Regulatory Act of 1984. At the conclusion of the hearing, interested parties were invited to submit comments on the bill by early September. Enclosed is a statement on the bill by the Joint National Coal Association/American Mining Congress Committee on Surface Mining Regulations that expands upon the statement filed on our behalf by Mr. Chris Farrand of Peabody Holding Company at the August 10 hearing. We ask that it be included in the hearing record on S. 2879.

We appreciate the opportunity to submit our views on this important piece of legislation and urge that you and the Select Committee on Indian Affairs give them your serious consideration. We stand ready to work with you and your staff in resolving the difficult issues that attend this legislation and in fashioning appropriate legislative language that fairly considers the views of all affected parties.

In order that the intent of the bill is reflected in the statutory language, our statement focuses on the need to clarify the following provisions in S. 2879:

- Section 4 -- Applicability of the bill's provisions to "Indian lands" -- should be restricted to cover only reservation lands.
- Section 9 -- Civil and criminal jurisdiction of the tribes over non-Indians -- should be restricted to civil jurisdiction only and should specifically preclude any assumption of criminal jurisdiction by the tribes.
- Section 9(d) -- The structure of the Indian tribal court review system -- de novo review by a Federal

court of tribal court decisions is essential. Basic constitutional rights should be guaranteed.

- Section 13 -- Conflicts of interest -- a mechanism must be established that will ensure balanced treatment of operators and will avoid conflicts of interest on the part of Indian regulators.

- Section 6 -- Partial programs -- standards must be set regarding the creation, use and evaluation of these programs. The programs should not be autonomous, but should function as part of the Federal Indian lands program.

- Section 7 -- Cooperative agreements -- consideration should be given to the use of these agreements in lieu of the partial program approach. In any case, standards and criteria regarding the use and functioning of cooperative agreements are essential and should be spelled out.

- Section 14 -- Archaeological investigations -- without substantial amendment, this section should be deleted. The existing statutory scheme, together with implementing regulations and guidelines, is more than adequate to protect archaeological and cultural resources.

More•details on our position on each of these provisions are provided in the attached statement.

Should you or your staff have any questions regarding our statement or the positions expressed therein, please do not hesitate to contact us.

Sincerely,

William E. Hynan
William E. Hynan
Senior Vice President
National Coal Association

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Enclosures

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STATEMENT ON S. 2879
SEPTEMBER 5, 1984

This statement is submitted by the National Coal Association and the American Mining Congress Joint Committee on Surface Mining Regulations (Joint Committee). It addresses S. 2879, a bill to provide for cooperation between the Secretary of the Interior and Indian Tribes with respect to the regulation of coal mining operations on Indian reservation lands and the acquisition and reclamation of abandoned mines on such lands, and for other purposes.

The NCA/AMC Joint Committee represents the coal industry on all matters regarding surface coal mining and reclamation. We represent all of the producers who operate on Indian lands as well as many who are interested in looking into the viability of new development on Indian lands. Our cadre of experts represents some of the best legal and technical talent in the industry on those subjects impacting surface coal mining including hydrology, revegetation, cultural resources, permitting, reclamation technology and Indian lands. It is in our representative capacity and as experts on all facets of the surface mining program that we present this statement for your consideration.

The Joint Committee is extremely interested in S. 2879 and the development of a realistic and coordinated regulatory scheme on Indian lands. We requested time to testify at a hearing held on August 10 regarding S. 2879 but were told that the tight schedule necessitated limiting the witness list to those who had already been selected and that we could submit a written statement for the record. We submitted a brief statement at that time outlining some of our major concerns. Our statement filed today sets forth our position in more detail and amplifies some of the issues discussed in our August 10 statement. We ask that these statements be included in the record on S. 2879. We wish to reiterate our willingness to work with the Committee members and the staff in formulating statutory language in support of our recommended changes and modifications.

In our statement today, we hope to provide you with a brief overview of some of the major concerns of the coal industry attending the development of an Indian Lands Program for the regulation of surface coal mining. The coal industry has a keen and abiding interest in the development of this program. We submitted extensive comments to the Office of Surface Mining (OSM) in May of 1983 on its draft report to Congress and in January of this year on OSM's proposed permanent program regulations for surface coal mining and reclamation operations on Indian lands. Copies of both sets of comments are included for the record.

We have also met with representatives of the Crow, Hopi and Navajo tribes on two occasions and with the Council of Energy Resource Tribes (CERT). Given our history of active operation of surface coal mines on Indian lands, we believe we are in an excellent position to comment on both the legal and practical aspects of an Indian Lands Program dealing with surface mining. As the regulated industry, we also have an important interest in whatever legislative or regulatory mechanism is fashioned for surface coal mining operations on Indian lands.

The development of a program for the regulation of surface coal mining and reclamation operations on Indian lands has taken a rather divergent course since the enactment of the Surface Mining Control and Reclamation Act (SMCRA) in August of 1977. Congress' scheme for the regulation of surface coal mining on Indian lands is set out in Section 710 of the Act and envisions three phases of development. First, a study of the regulation of surface mining on Indian lands was to be completed taking into consideration the special jurisdictional status of these lands. Second, a report was to be made to Congress that was to include proposed legislation designed to allow Indian tribes to elect to assume full regulatory authority over the administration and enforcement of regulation of surface coal mining on Indian lands. Lastly, following enactment of Indian lands legislation by Congress, a permanent regulatory program for the regulation of surface coal mining on Indian lands was to be developed by OSM that provided an opportunity for the Indian tribes to administer the program where appropriate. During the interim, Section 710 provided for certain provisions of SMCRA to be applicable to coal mining operations on Indian lands pending adoption of a final regulatory program.

Several factors have occurred over the past several years to disrupt this Congressionally contemplated scheme of events resulting in significant delays, missed deadlines and frustrated interested parties. The report to Congress due in January 1978 was only recently submitted and OSM is currently moving to promulgate a permanent Indian lands regulatory program prior to enactment of implementing legislation. Complicating all of this was the recent introduction of legislation (H.R. 4860 and S. 2879) designed to address many of the significant issues attending an Indian lands Program.

The real impact of these delays and complications, however, has been most severely felt in the coal fields by those companies attempting to operate on Indian lands. The uncertainty that exists on Indian lands because of the lack of well-defined lines of jurisdiction and authority has made the channels for obtaining the authorization to mine on those lands tortuous at best if not totally counterproductive. Operators find themselves having to comply with numerous, sometimes contradictory, mandates and with two or more "regulatory authorities." Some examples of these situations are included later in this statement. The coal industry supports the efforts to resolve the regulatory uncertainty that exists on Indian lands.

In this regard, we should note here that the Joint Committee has recently supported, with several recommended changes, OSM's proposed permanent regulatory program for Indian lands. The coal industry contends that something can and must be done immediately to give some direction and focus to the regulation of surface mining on Indian lands. We believe that OSM's proposed interim federal program, if properly structured, has the potential for eliminating many of the problems giving rise to the uncertainty, since it would establish a functioning OSM program on

Indian lands. With this goal in mind, the Joint Committee has agreed to work with OSM to develop the most effective interim program possible recognizing that any final long-term solution involving the Indian tribes will require a complete and thorough understanding of the basic underlying issues raised by Section 710 of SMCRA.

In our view, any legislative effort on Indian lands must focus on and address several key issues that can be summarized as follows:

- applicablility of the Act's provisions to "Indian lands"
- the civil and criminal jurisdiction of the tribes over non-Indians
- the structure of the Indian tribal court review system
- the assurance of constitutional guarantees for non-Indians with access to the Federal court system to protect them
- waiver of sovereign immunity by tribes
- conflicts of interest of the tribes
- partial programs and cooperative agreements
- archaeological investigations

The significance of these issues, however, is not so much the need for their resolution but rather that any resolution must necessarily be viewed in a much broader context than surface coal mining operations. These issues are of generic importance to virtually any activity by non-Indians on Indian lands and must be addressed by Congress in that light. To assume that these issues are somehow applicable only to surface coal mining operations on Indian lands is to ignore a very basic reality, i.e. that Congress' resolution of these issues will affect all activities occurring on Indian lands. In this regard, Congress' reluctance to come to grips with these very issues over the past 100 years should not serve as an excuse to ignore them now.

Both the CERT study and OSM's recent report to Congress tend to downplay the significance and far-reaching impacts that Congressional resolution of these issues will likely have. If we accomplish little else in this statement, we hope to leave you with a recognition that your decisions on these weighty issues will affect more than just the regulation of surface coal mining. Consequently, we urge you to give serious consideration to any legislation that the Committee ultimately decides to move regarding Indian lands and to solicit input from as wide a range of interested parties as possible.

National Indian Policy

Since the Joint Committee represents the coal industry, our major concern centers upon making certain that the SMCRA regulatory mechanism on Indian lands is realistic, workable and will ensure good reclamation without needless confusion and delay. In this respect we believe it is essential for Congress to focus on coal surface mining and the problems involved with the development of Indian coal reserves. Section 710 of the Act should not be used as a vehicle for the creation of a new national Indian policy, which would supposedly clarify Indian sovereignty, provide tribal courts with criminal jurisdiction over non-Indians and subject them to Indian tribal law, create an independent judiciary not reviewable by federal courts and, in essence, establish Indian governmental autonomy similar to, and in some instances greater than, that of the fifty states.

The underlying issues involved in such a far-reaching change in Indian policy transcend establishment of an Indian lands program for surface mining and must take into consideration not only the legal implications of such a policy change by Congress but also the more complicated social, political, cultural, and governmental issues that are at the threshold of any such reevaluation. This is not to say that national Indian policy should not be reviewed by Congress or that changes are not necessary and appropriate. However, any revisions should be done in the context of that policy and not on the coattails of surface coal mining legislation.

It is our position that the development of an Indian lands program pursuant to Section 710 can and should be accomplished based on the present Indian policy as reflected in existing legislation, rulings and regulations. Any changes in national Indian policy that might be made as a result of subsequent congressional actions, based on a reevaluation of the threshold issues in a broader context, could then be incorporated in the Indian lands program at a later time. S. 2879 takes a more realistic approach to these matters and does not invoke all of the broad policy concerns that other measures have attempted to tackle. In this regard, we are encouraged by the bill's sharper focus on the issues that attend legislation in this area.

Turning now to some of the major issues, we wish to demonstrate not only their importance as individual, substantive questions of law and procedure but also their far-reaching impacts and how they are currently affecting surface coal mining operations on Indian lands.

Tribal Civil and Criminal Jurisdiction

As pointed out in the OSM study, Indian criminal jurisdiction is strictly limited by federal legislation (Indian Civil Rights Act). It extends only to Indian tribal members within the reservation (not to non-Indians) and the jurisdiction over those members is limited to offenses for which a tribal court can impose not more than six months imprisonment and/or a fine of $500.

Jurisdiction over non-Indians is limited to civil matters within the reservation with criminal offenses being subject to federal jurisdiction. The Supreme Court has held that the retained sovereignty of Indian tribes over tribal reservations does not include the power to punish non-Indians who commit offenses against tribal law.

We believe that Indian jurisdiction over non-Indians, the application of tribal law and the role of tribal courts should not be changed solely for the regulation of surface mining and applied only to coal operators on Indian lands. The question of Indian jurisdiction over non-Indians should be considered in the light of all non-Indian activities on the reservation and should not single out coal operators as the only non-Indians on reservations subject to Indian law and tribal courts. The functioning of federal criminal jurisdiction and federal court review on Indian lands has been effective over the years and we can see no reason why it cannot continue in the same manner with respect to surface mining regulation until Congress decides that it is in the public interest to subject all U.S. citizens to Indian criminal jurisdiction on reservations.

S. 2879 appears in section 9 to recognize the limitation of tribal jurisdiction to civil matters only and to specifically preclude any assumption of criminal jurisdiction by the tribes. We believe such a delineation of authority is essential and believe the bill must continue to spell this out clearly.

Applicability of the Act's Provisions to "Indian Lands"

It is industry's position that the definition of "Indian lands" should be restricted to those lands within the exterior boundaries of the reservation. The intent of S. 2879 seems to be to give the Indian tribes the right to take over regulation of surface mining only within the exterior boundaries of a reservation. Section 4(b) of the bill indicates that the Act's provisions will apply to "Indian lands within the exterior boundaries of an Indian reservation" whereas section 4(a) subjects lands outside the exterior boundaries of the reservation to those provisions of titles IV and V of SMCRA that apply to non-Federal lands.

Unfortunately, S. 2879 adopts the definition of "Indian lands" contained in SMCRA without modification (except for the fact that a comma after the words "mineral interests" has apparently been omitted by mistake) and it, of course, can be read to include Indian lands outside the reservation. The term "Indian lands" is used throughout the bill and in several particularly critical areas where the meaning intended appears to be restricted to "reservation lands." The reliance on the Indian lands definition and the use of the term in the above-described manner creates considerable confusion (See, e.g., sections 7(c)(1) and 9(b)) and should be corrected in order to leave no doubt as to the meaning intended by Congress. In any event, conflicting claims of jurisdiction would exist because the states, OSM and the Tribes would read such provisions in a light most favorable to them. Such confusion should be avoided at the legislative stage rather than subjecting the problem to protracted litigation and to resolution by the courts in an attempt to determine what was intended.

OSM discusses the issue of tribal regulation of activities outside the boundaries of reservations in its report to Congress. It should be noted that the lead case cited by OSM for the proposition that tribes can assert regulatory authority off the reservation involves tribal jurisdiction over Indian children off the reservation, which presents a very unique factual situation involving a different jurisdictional issue from that under consideration here. In addition, OSM discusses only Congress' legal authority whereas the crux of the matter involves the threshold questions--the social, political, cultural and governmental issues.

The off reservation lands include checkerboard ownership patterns involving thousands of acres of non-Indian surface, federal coal and allottee surface, Indian fee and private coal as well as others. Each situation must be analyzed separately. But in most instances, extending tribal jurisdiction beyond the reservation could create serious conflicts that would significantly hamper development of Indian and adjoining private and federal coal reserves. It would only complicate the existing checkerboard pattern and in many instances could supersede state and federal jurisdiction on thousands of acres. Private coal and surface interests would be regulated by a government in which they had no voice.

Example 1: The Crow Ceded Area in Montana

The Crow Ceded Area is that area of land between the north boundary of the Crow Indian Reservation and the Yellowstone River, comprising portions of Big Horn, Yellowstone and Treasure Counties in southeastern Montana. This land was ceded to the United States by Act of Congress in 1904, and opened for settlement. Individual Indians living on allotted land were given the option of selling their land and moving to the diminished reservation, or maintaining their property rights. With some exceptions, rights to minerals other than coal were transferred to the settlers. Rights to coal were not deeded in most areas with known coal reserves, but many surface patents included coal rights as well. Surface and mineral rights in Sections 16 and 36 of each township were transferred to the State of Montana as "school sections."

In 1958, Congress restored all unpatented lands in the Ceded Area to Crow tribal trust status. The United States has considered this transfer to include unpatented mineral rights, including coal. Present surface ownership in the Ceded Area is summarized below:

Fee	1,046,735 acres
State	41,844 acres
Allotted	17,008 acres
Tribal	8,978 acres

The accompanying map (Map 1) demonstrates the complexity of ownership in a portion of the Ceded Area where there are known coal reserves and present mining activities. It would be virtually impossible to define a mining unit in this area that did not include severed tribal coal. Scattered parcels of tribal surface exist in some areas, but in no case could a mine operation be limited to such lands. Furthermore, it is not difficult to visualize how severed tribal coal, private fee coal, unsevered tribal coal and state coal might all be included within a single mine operation.

There is one active surface coal mining operation in the Crow Ceded Area. Westmoreland Resources, Inc. holds the Tract III Crow Indian Lease, as well as several adjacent private and State of Montana leases. Coal is currently produced from the

Crow and state leases; all Crow coal underlies fee surface owned by Westmoreland (see map). Since the Absaloka Mine was opened in 1974, the State of Montana has regulated mining and reclamation operations. The Bureau of Land Management, in cooperation with the Bureau of Indian Affairs, reviews and approves mining plans, and routinely inspects the mine to assure that coal recovery is maximized for the benefit of the Crow Tribe. Recently, the Office of Surface Mining has asserted regulatory authority on the Indian lease under Section 710 of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), on the strength of the Indian lands definition of Section 701(9).

As a result, Westmoreland is subject to dual regulatory authority, including dual permitting and dual enforcement. The State of Montana has provided government service since the 1904 cession, and continues to claim regulatory jurisdiction outside reservation boundaries. It is asserted that this claim is valid because Section 710 of SMCRA states that nothing in this Act shall affect existing jurisdictional relationships. OSM, on the other hand, interprets the present definition of Indian Lands to include severed mineral estates outside reservation boundaries. Clearly, for the purpose of regulating surface mining, these lands cannot be both "Indian lands" and "lands within a state" as defined in Section 701 of SMCRA.

Clearly, SMCRA contemplated a single regulatory authority, based on the definitions of "Federal lands", "lands within a state" and "Indian lands" (Section 701). Furthermore, if jurisdiction over Indian proprietary interests were to rest with the tribe, the tribe and the state would have exclusive jurisdiction over different portions of a single mine operation. Such a situation could result in very different standards for different areas within the same mine, creating extreme difficulty for the operator since it would be impossible to plan and execute a standarized mining and reclamation plan. Dual regulatory authority over the same lands creates obvious problems, such as dual permitting, dual enforcement, dual bonding and the potential for conflicting performance standards.

Jurisdictional disputes and dual regulation in the Ceded Area are inevitable unless regulatory authority remains with the State of Montana. Extending tribal jurisdiction based on property ownership alone is sure to create a multitude of conflicts where land and mineral ownership is so diverse. The purpose of SMCRA was to require reclamation of lands disturbed by surface coal mining. Tribal jurisdiction over surface mining should be restricted to lands within reservations so as to avoid the conflicts inherent in dual regulation of the same aspects of mining and reclamation.

It should be remembered that the off-reservation surface and mineral interests owned in fee or held in trust for the Indians were not put together with any significant thought being given to the creation of governmental units. This is unlike states that were from their inception established to govern and have clearly established jurisdictional boundaries. Unless Indian jurisdiction is restricted to those lands within the exterior boundaries of the reservation, over a million acres in the Ceded strip alone could be removed from state or federal jurisdiction. If the Indian mineral interest only is determinative of Indian jurisdiction then there would be three jurisdictions checkerboarded in the area--state, federal and Indian. If Indian surface held in fee or in trust is used as the basis for jurisdiction, then federal and privately owned coal would be lost to state and federal jurisdiction and the checkerboard situation would also exist The reservation is the jurisdictional unit most similar to that of a state and hence provides the only viable, realistic geographical and jurisdictional description for use in designing and effectuating a regulatory program. Indian lands and coal reserves outside the reservation will, of course, still be required to meet all of the SMCRA requirements with federal oversight ensuring compliance. In addition, special concerns of the Indians can be protected through lease terms.

Example 2: Split Estate Lands -- The McKinley Mine Experience

Additional concerns are raised where there are split estate lands. In OSM's report to Congress on Indian lands legislation, options 3, 4, and 5 for the definition of "Indian lands" include as Indian lands those areas where the tribe has an interest in either the surface or coal but not necessarily both. Where the estate is split and the non-Indian portion is, for example, owned by the Federal Government, these definitions will breed duplicate and inconsistent regulatory authority because of the overlapping responsibilities between the tribes on the one hand pursuant to their program and the Secretary on the other given his authority under SMCRA and the Mineral Lands Leasing Act of 1920. As a result the operator must file separate reports, undergo dual inspections, and apply for separate permits all for the same tract. Compliance in such circumstances is duplicative at best, conflicting at worst.

The McKinley Mine of the Pittsburg & Midway Coal Mining Co. (P & M) in New Mexico is a prime example of the mixed authority pattern that will result from the various proposed definitions. Prior to the enactment of SMCRA, the mine held one comprehensive life of mine permit, issued by the New Mexico Surface Mining Commission and the Conservation Division of the U.S. Geological Survey. Subsequent to the passage of SMCRA and the approval of the New Mexico regulatory program, the mine applied to the New Mexico Mining and Minerals Division (MMD) for a SMCRA permit that again included the entire mine pending the outcome of Indian lands legislation and a Navajo tribal program. The coverage of the comprehensive permit that is now undergoing review by MMD and OSM in association with the Navajo tribe is shown in Map 2.

For this particular mine, Definition options 1, 2, 3, 4, and 6 are indistinguishable and the regulatory pattern is shown on Map 3. Both MMD and OSM inspect and enforce on the reservation. MMD also inpsects and enforces off the reservation, although with respect to allotted lands, P & M has not had any jurisdictional disputes, with the state enforcing thereon. This has been fairly consistently applied since both authorities use the New Mexico regulations, although OSM cites the 25 CFR regulations when they note a possible violation. There have been instances where inspectors have been confused and have incorrectly noted areas under the wrong regulations and jurisdiction. In all liklihood P & M's permanent permit will be granted by both OSM and MMD for all of the permit area so that the company is assured that whoever has authority over whatever lands, P & M has that agency's approval for the entire operation.

The "on the ground" problem inherent with multi-jurisdictional authorities is that the geology of the area that dictates the mining pattern does not recognize differing or conflicting physical or philosophical differences with respect to jurisdictional boundaries. The mining and reclamation plans have not been disrupted since the regulations are applied across the mine. Under a separate Indian lands program which, from all indications, will contain at a minimum different permit information, regrading, and revegetation requirements, mine operation will be made much more difficult, perhaps unworkable.

Definition options 3 and 5 are indistinguishable for this mine and would lead to the regulatory pattern shown on Map 4. Different requirements applied in this checkerboard pattern would make mine operations as well as permit preparation, review, approval, and enforcement extremely difficult, if not impossible. Some sort of single, clear agreement between OSM, the Navajos and MMD would be required if the mine is to be operated effectively.

Tribal Courts

The tribal courts, unlike the state courts, have limited jurisdiction and are essentially concerned with tribal law and tribal members. Consequently, tribal courts in most cases are not adequately structured to cope with the complicated demands of a large administrative bureaucracy requiring as it does review of innumerable decisions, regulations and enforcement actions. Even the most sophisticated of the tribal courts would need a major revamping to undertake such a task whereas most tribal courts would have to be completely restructured, especially as to appellate review.

SMCRA did not have to address the question of adequacy of state or federal courts since they had been functioning for numerous years and were familiar with administrative law and appellate review. If in the review of national Indian policy Congress grants more governmental autonomy and jurisdiction to the tribes, then consideration should be given to restructuring the tribal courts. It would not appear warranted to undertake such an overhaul simply for the surface mining program since it would be more reasonable to create an Indian administrative review agency with appeal to the appropriate federal court.

In any event, de novo review by a federal court of tribal court decisions as set forth in section 9(d) of S. 2879 is essential. However, the de novo review should be performed under 5 U.S.C. 706, not just section 706(2), in order to give the court the authority to enforce its orders.

The de novo review provision will insure consistent interpretation of SMCRA so that operations on Indian lands will be required to meet requirements similar to those enforced on non-Indian lands. Additionally, de novo review is necessary because of the coal operators' lack of familiarity with the tribal court systems and because the tribes do not understand and are unfamiliar with the intricacies of coal mining. Further, different tribes and different tribal judicial systems may interpret Indian land reclamation laws and regulations in inconsistent ways. A review system involving federal district courts can help ensure consistent judicial application. Finally, even in the tribal court system, there should be provision for basic constitutional guarantees. All of the above should be made clear in the legislation.

The de novo review provision limits such review to those situations where a "final action" of a tribal court is involved. However, mining could be stopped or severely impacted by "temporary" orders of tribal courts that could then remain in effect for long periods of time. Thus, we propose that de novo review be permitted from any order of a tribal court, whether or not final, that stops mining for an appreciable period of time or has a significant adverse affect upon it.

Sovereign Immunity

An Indian tribe must waive its sovereign immunity as to surface mining regulation in order to receive approval to assume jurisdiction over any portion of a coal mining and reclamation regulatory program. This would enable suits to be brought against tribes and tribal regulatory authorities to the same extent that suits may be maintained against the states. It would also assure that the constitutional rights of coal operators are guaranteed. Because some tribes may not have the unilateral authority to waive their sovereign immunity voluntarily without Congressional approval, we suggest that the bill provide generic authorization for tribes to waive sovereign immunity as a condition of their acceptance of regulatory authority.

Conflict of Interest

With regard to section 13 on conflicts of interest, it should be recalled that tribes are distinguishable from the states because in addition to being governmental entities, they also may be coal operators or may derive a substantial part of their revenues from coal royalties and severance taxes. Further, the relatively small population of many tribes means that revenues derived from mining operations or even from Indian SMCRA fines could be of significant individual importance to an Indian regulator. To the extent tribes are dependent on coal-related income, they have an interest in promoting mining on their lands.

Some mechanism must be utilized to ensure balanced treatment of operators and to avoid conflicts of interest on the part of Indian regulators arising from their tribal membership when that membership gives them a significant financial interest in the mining activities on the reservation. For example, if a tribe enters into a joint venture and has a profit interest in one operation, there should be some mechanism to protect other operations on the reservation in which the tribal interest is limited to production royalties.

Partial Programs

The "partial, phased program" that the tribes may adopt pursuant to Section 6(a) of the bill for the development of expertise has no real equivalent in SMCRA. It is difficult to ascertain exactly what is intended for this partial program and what standards govern its creation and evaluation. S. 2879 must set these out in detail. Additionally, we believe that the partial program should not be autonomous but should function as part of the Federal Indian Lands Program under the Office of Surface Mining until a full tribal program is in effect.

The Joint Committee believes there are a number of additional problems associated with the proposed partial program concept. First, we find no definition of a "partial, phased program." The language appears to suggest that enforcement is the only program area not to be included in a partial program. Moreover, for program areas not covered in a partial tribal regulatory program, there is no provision for an interim regulatory authority or program. As drafted, the bill provides that upon approval of a partial program, that partial program, though incomplete, becomes the sole regulatory program in effect on the designated Indian lands. If the bill did not intend to result in such incomplete programs, the question arises as to whether there would be two separate regulatory authorities operating on a duplicative basis in the area. Dual authorities governing the same operation will create a confusing atmosphere for all parties concerned and may place the operator in an impossible position of becoming the proverbial ping-pong ball, riccocheting between two competing regulatory bodies.

This situation is further complicated by two other factors. First, the bill provides that, prior to approval of a full or partial tribal program or a Federal Indian Lands Program, the interim effective program shall be Section 710(c) and (d) of SMCRA. Unfortunately, Section 710(d) of SMCRA has not yet been implemented by the Secretary, although final rules are expected shortly. However, we do not believe OSM has the necessary statutory authority to issue regulations of the scope contained in the proposed rules issued on October 24, 1983.

Second, since a Federal Indian Lands Program may not be in effect at the time a partial tribal program is implemented, it should be remembered that Sections 710(c) and (d) are limited to the imposition of performance standards. For example, Section 710 does not include the reference to Section 506 of SMCRA which provides the authorities for a permitting process. If a tribe elects not to include permitting in its partial program, there would be in effect no authority for issuing permits.

For these reasons, the Joint Committee believes that the proposed partial program will needlessly continue the current regulatory uncertainty of operating on Indian lands. Moreover, we believe the partial program would place Indian lands operations under a regulatory mechanism more burdensome than those applicable to non-Indian lands.

Cooperative Agreements

The cooperative agreements provided for in Section 7(c) are also significantly different from those spelled out in SMCRA. The latter agreements were essentially a mechanism to permit fully developed and approved state programs to be implemented on federal lands. The S. 2879 cooperative agreements, although allowing implementation of Indian programs (partial or full), can also be vehicles for developing a "participatory role" for the tribes. There are no standards for the creation or evaluation of these latter types of agreements and we believe it is essential that they meet some criteria. The bill must set forth how these agreements are expected to function as part of a partial program.

There is some question whether cooperatives agreements can needlessly complicate the partial program mechanism. We remain concerned that even under a cooperative agreement, there might be two separate regulatory authorities operating on a duplicate basis implementing a partial tribal regulatory program. If S. 2879 anticipates tribal assumption of regulatory responsibilities on a piecemeal basis, supplementing a federal program, we believe the cooperative process will be as burdensome as a partial program. Moreover, we believe dual regulatory autorities will exacerbate the current uncertainty of operations on Indian lands, placing such lands at a competitive disadvantage with operations on non-Indian lands.

The Joint Commitee favors an approach whereby cooperative agreements are used in lieu of a parital program. A cooperative agreement approach under which the tribe assumes regulatory responsibilities as part of implementing a full tribal regulatory program would satisfy the same purpose envisioned for a partial program i.e., phased-in tribal participation. Such a cooperative agreement process would also help ensure the relatively smooth transition to full regulatory responsibilities similar to state program approvals without the duplication and confusion likely under a partial program.

Archaeological Investigations

Section 14, which requires an archaeological, historical and cultural resource investigation prior to permit approval, would impose an unjustified, overlapping requirement on top of an already existing cultural resource protection program established and defined by at least six statutes. The program goes back to the Antiquitites Act of 1906 through the enactment of the National Historic Preservation Act of 1966 and the Archaeological Resources Protection Act of 1979. Operators are required to comply with all of the applicable statutes as well as the implementing regulations, guidelines and instructional memoranda. The historic and archaeological resource protection program sets forth a complicated procedure for the protection of significant artifacts and properties through a process of discovery, investigation, evaluation and mitigation. The imposition of a new layer of extensive investigatory procedures to presumably serve the same objective is unwarranted. The additional cost burden and delay could seriously vitiate the economic viability of an existing operation as well as ameliorate the economic potential of a contemplated operation.

Additionally, as drafted, the requirement is so vague as to be almost unattainable. The provision lacks the kind of definition which most statutory requirements must have to be enforceable and effective. The provision contains no standards to describe the resources to be investigated. The use of the word "complete" implies that the whole permit area, even lands within the permit boundary not actually disturbed, must be investigated. Moreover, the provision implies that all such resources, regardless of their cultural, historical or archaeological significance, are to be thoroughly investigated.

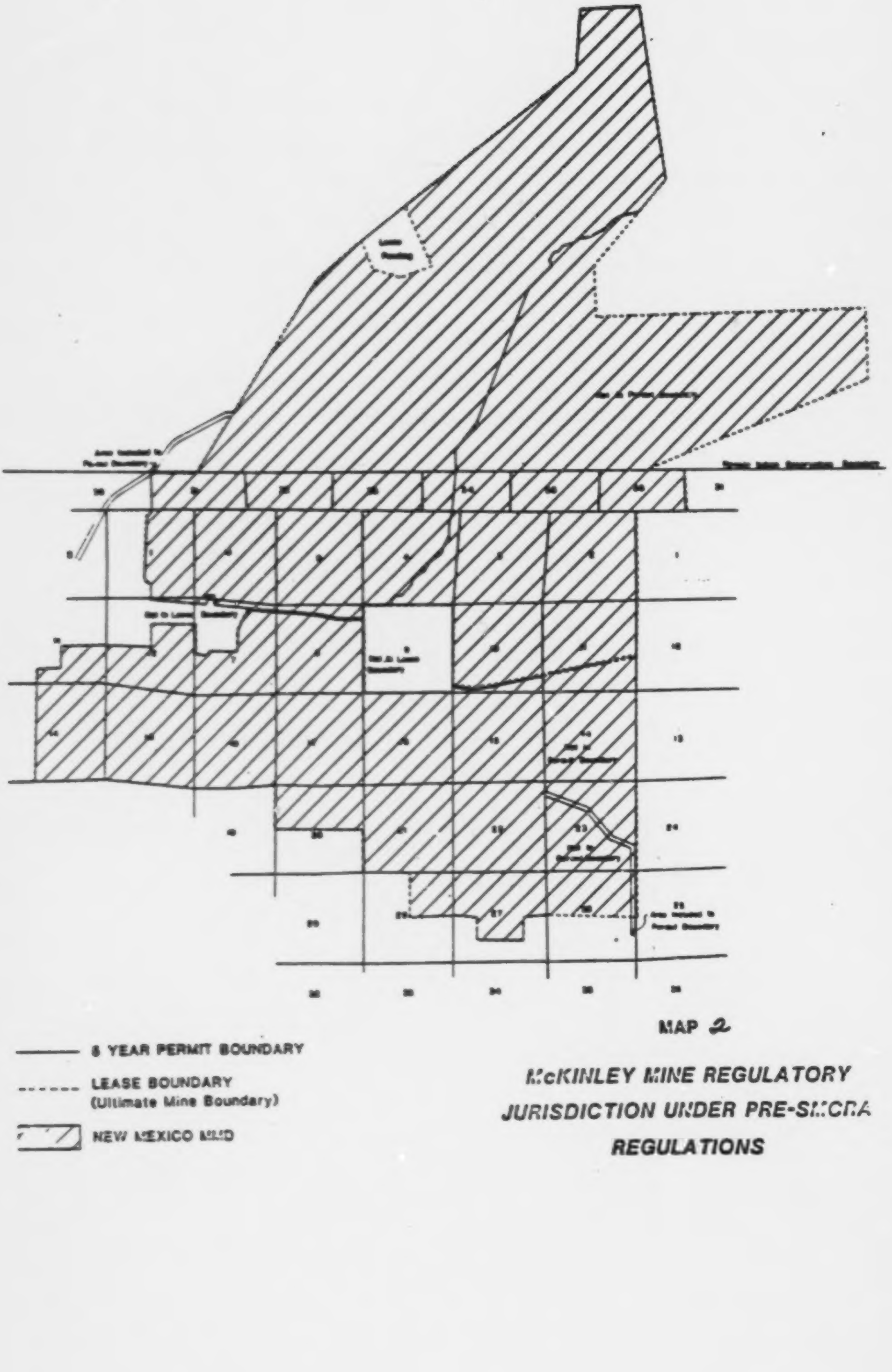
Finally, the tribe becomes the sole arbiter of whether the investigation is complete or not complete, even if the tribe is not the regulatory authority. Without proper definitions or standards, or a formal review mechanism for judging the completeness of the investigation, the provision is so vague as to be meaningless and would subject operators to costly, arbitrary and capricious action.

The provision is especially troubling because it is a requirement that comes after the coal has been leased, and, in some cases, after a mine has already been constructed. Because the bill by its reference to SMCRA may require submission or resubmission of all mine plans, the situation may arise in which the lessee/operator has a valid right to the coal and has large investments in a mine, yet by the simple mechanism of refusing to declare the investigation of the archaeological, historical, and cultural resources "complete", the lessee/operator is arbitrarily denied the right to mine or even have his application for a mining permit considered.

This section must be deleted. The existing statutory scheme provides more than adequate protection for archaeological and cultural resources.

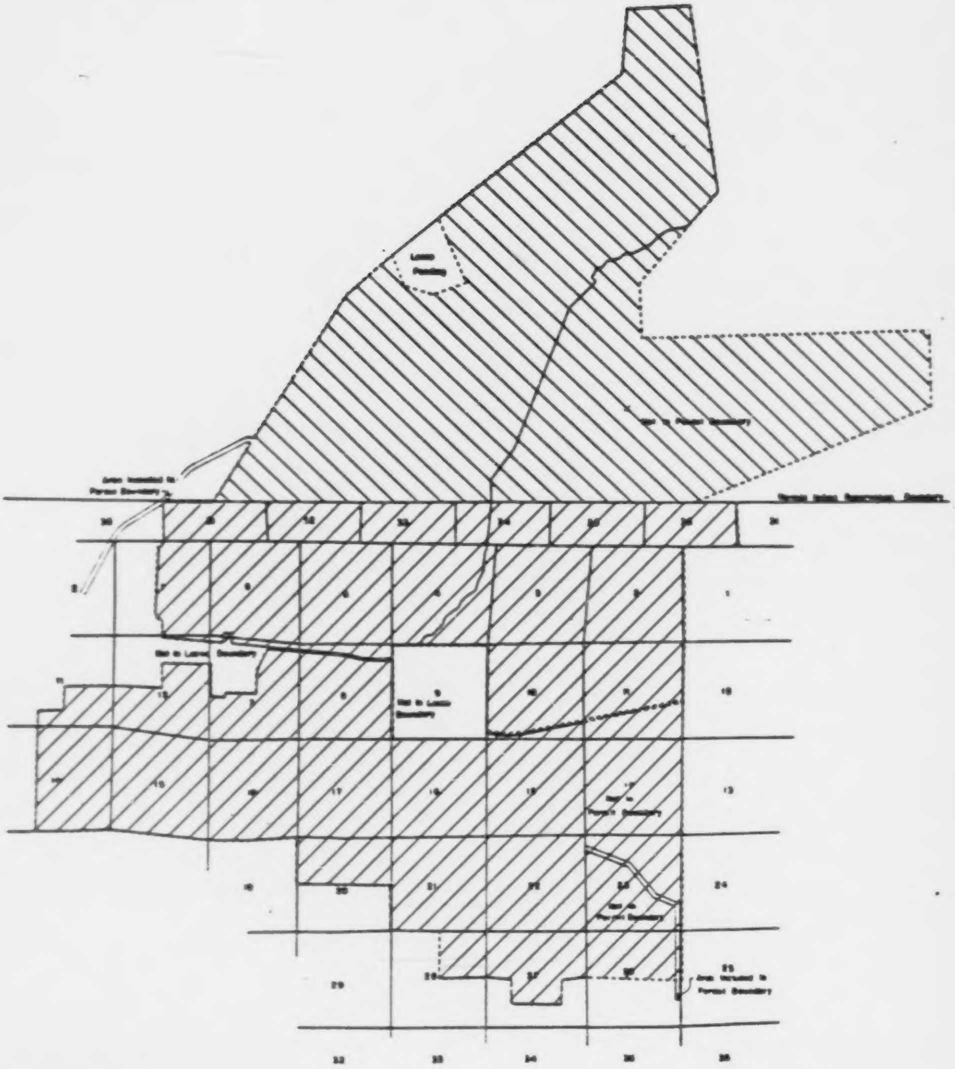
In conclusion the coal industry stands willing and able to work with the Committee and all interested parties to resolve the many complex issues attending surface coal mining operations on Indian lands in the most appropriate manner. No one is more interested in seeking a resolution of the major issues than our industry. A speedy resolution will assure the certainty and clarity necessary for effective development of the Indian coal resource.

Thank you for this opportunity to present our views.


5 YEAR PERMIT BOUNDARY
LEASE BOUNDARY (Ultimate Mine Boundary)
NEW MEXICO MMD

MAP 2

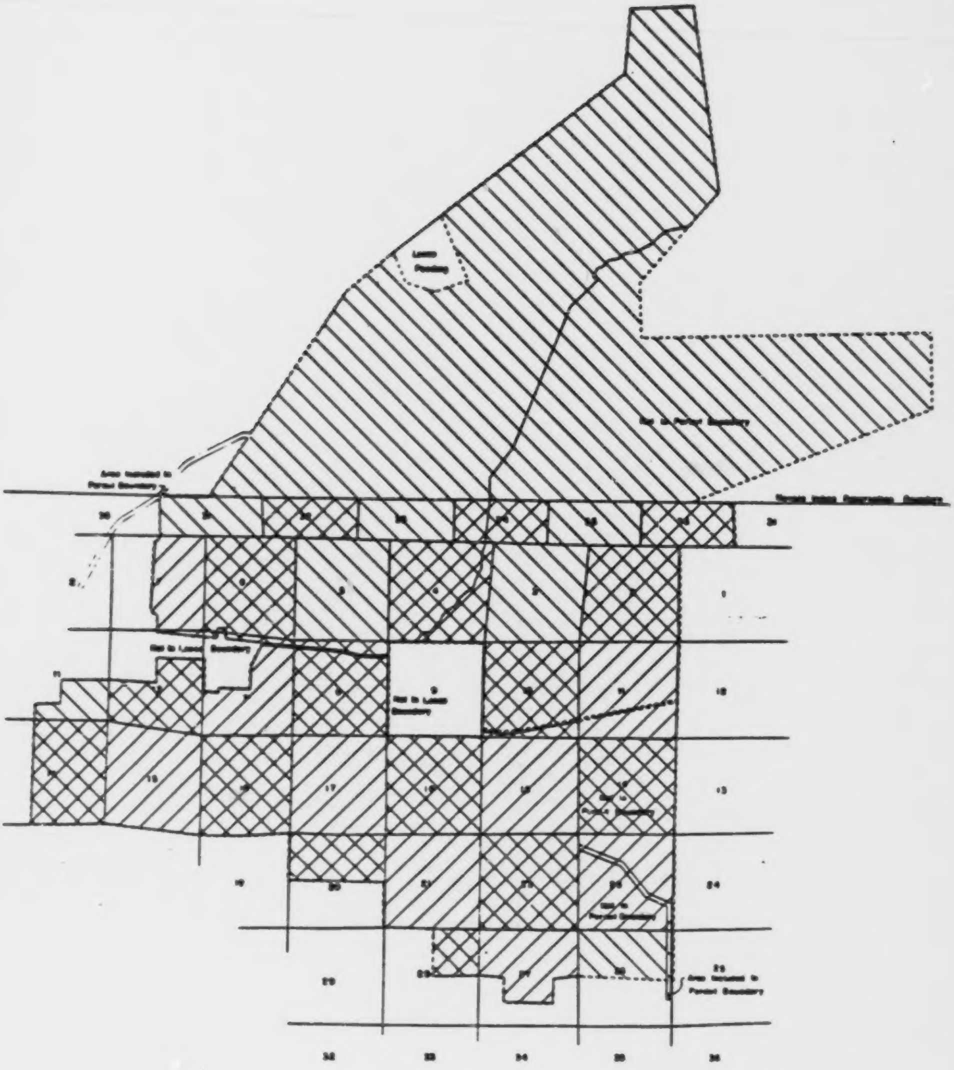
McKINLEY MINE REGULATORY JURISDICTION UNDER PRE-SMCRA REGULATIONS



NEW MEXICO MMD (Including Federal Lands Under a Cooperative Agreement)
NAVAJO

MAP 3

POSSIBLE McKINLEY MINE REGULATORY
JURISDICTION UNDER INDIAN LANDS
DEFINITION OPTIONS 1, 2, 4 AND 6



▨ NEW MEXICO MMD

▧ NAVAJO

▦ NAVAJO AND FEDERAL
(Alotted Surface, Federal Coal)

MAP 4

POSSIBLE McKINLEY MINE REGULATORY JURISDICTION UNDER INDIAN LANDS DEFINITION OPTIONS 3 AND 5

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**Joint NCA/AMC Committee
on
Surface Mining Regulations**

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RECEIVED SEP 27 1984

September 27, 1984

The Honorable Mark Andrews
Chairman
Select Committee on Indian Affairs
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

As the Select Committee moves to mark-up S. 2879, the Indian Coal Mining Regulatory Act of 1984, the coal industry wishes to reiterate its support for the bill as amended (draft dated September 25, 1984).

As you know, a joint letter was sent to the Committee on September 10 from industry and tribal representatives indicating our agreement on the majority of the provisions in the bill and suggesting several amendments. Most of these amendments have been incorporated into the most recent revision of the bill.

There remain three areas, however, that the industry and the tribes failed to agree upon. These issues, which are essential to our continued support of the bill, are:

1) de novo review of tribal court judgments in federal district court;

2) the requirement that cooperative agreements adopt the most stringent standards of any of the parties to such agreements, and

3) the apparent confusion regarding state regulatory jurisdiction over Indian lands off the reservation.

We should note that our concerns are directed at the most recent version of the bill that has been provided to us--a draft dated September 25, 1984. That draft includes the de novo provision that we believe is a prerequisite to the continued viability of our support for the bill. However, the draft does not contain the "stringency" standard that we advocate nor does it clarify the confusion attending state jurisdiction over off-reservation Indian lands. It is our understanding that the latter issue may be addressed by a recently drafted amendment. In any case, we would strongly urge that all three issues be carefully addressed before enactment, especially the issue of de novo review. Many of the affected companies would oppose passage of the legislation without this critical provision.

A. De Novo Review.

In discussing the basis for seeking de novo review of tribal court decisions, it should be emphasized that, under S. 2879, tribal courts will have civil jurisdiction over cases of great significance to operating coal companies. Included among those cases would be penalty assessment cases in which fines of as much as $5,000 can be levied. Such penalties are far in excess of the fine limitation of $500 presently placed on tribal courts under the Indian Civil Rights Act. Most important to the operating companies, however, will be those cases in which the tribal court reviews the validity of enforcement orders requiring the cessation of mining operations or reviews permit decisions of the tribal regulatory authority. Such cases have potentially devasting consequences for mining operatons and the power plants which quite often depend on those mining operations as their sole source of fuel supply.

As a result, mining companies see several compelling reasons for de novo review of tribal court judgments. There is what can be best described as a mutual lack of familiarity between coal operators and the tribal courts. We do not pretend to be qualified to provide you with a critique of all the tribal courts. Industry had hoped that the Secretary of the Interior would provide Congress with such a critique in the study called for by section 710 of SMCRA. Such, however, was not the case. In a recently published study, American Indian, American Justice, the authors present a review of the tribal court systems. Considering that this study offers a largely sympathetic view of tribal institutions, the author's findings are of some concern to the coal industry. Among the findings made by the authors, Vine Deloria, Jr. and Clifford M. Lytle, are the following:

- Susceptibility to Political Influences. "Indian judges do not possess the independence enjoyed by judges in the Anglo-American judicial system."

- Inadequate Tribal Laws. "...tribal constitutions and codes are deficient. Not only are the laws badly written and ill defined at times, but there are also great gaps in these laws. Many laws are not even codified."

- Dearth of Civil Cases. Deloria and Lytle state "...the great variety of civil cases handled by the Anglo-American courts is not found in the tribal context. Indeed, few civil cases are brought before the courts of the reservation.... Most of the civil cases coming before tribal courts relate to domestic relations, such as divorce and child custody, and truancy."

- Need for Qualified Personnel. On this point, Deloria and Lytle state, "We have already discussed at some length the lack of legal training possessed by tribal judges. Most tribes require no qualifications at all for the post."

- Lack of Planning. "While the awareness of a necessity for long-range planning is always discussed, it seldom receives any real attention."

Clearly the existence of these factors within the tribal court system is of great concern to coal operators, particularly in light of the seriousness of the cases to be heard by tribal courts under S. 2879.

It is our view that providing for de novo review allows for a significant expansion of the civil jurisdiction of tribal courts with virtually no intrusion into the nature and make-up of such courts. The most likely alternative of imposing minimum standards on tribal courts could well "anglicize" them to the point of making them effective in dealing with mining reclamation cases at the cost of rendering them ineffective in performing their traditional role of resolving controversies between tribal members in accordance with tribal customs and values.

We also believe that providing for de novo review is in keeping with the concept found in many state and federal laws whereby courts presided over by non-attorneys are limited in the scope of their jurisdiction and are subject to broad appellate review.

It should also be pointed out that de novo review does not make the tribal court proceedings under S. 2879 a meaningless exercise. The tribal court proceedings will represent to the mine operator his most immediate and most economical means to resolve issues arising under a tribal regulatory program. It will be the exceptional case that will result in an operator spending the time and expense necessary for a de novo trial in federal court.

Further justification for the concept of de novo review lies in the fact that Indian law is one of the most complex and uncertain areas of the law today. Of particular concern to operators is the degree to which the protections of our Constitution's Bill of Rights would be applicable in tribal court proceedings. At the present time, those protections appear to be enforceable in the federal courts against tribal governments only in habeas corpus proceedings. We believe de novo review assures operators that they will not be subject to proceedings under S. 2879 without the protections of the Bill of Rights being ultimately available to them.

Finally, in cases brought under the standards of the Administrative Procedure Act (Section 706 of title 5, U.S.C.), there is case law which holds that the court is bound to decide in favor of the government agency if the agency has evidence to support its decision. The evidence need not be preponderant or uncontroverted in order for the agency's action to be upheld as a matter of course. Under such circumstances, the reviewing court, in order to be objective, must be able to make judgments based on the credibility of the evidence. If the reviewing court must rely only upon the written record and does not have access to witnesses and new evidence, it will be difficult to measure credibility and thereby make balanced judgments under existing case law.

In light of all of these considerations, we believe de novo review as provided in S. 2879 is the most workable and effective approach to tribal court jurisdiction over mining reclamation cases. We urge that it be retained.

One final note on de novo review: We understand that a proposed amendment may be offered that would amend section 11(d) by restricting de novo review to only that review "subject to the standards set forth in 5 U.S.C. section 706(2)." We caution the Committee that any such limitation would completely emasculate the effect of the present language in section 11(d) since section 706(2) of title 5, U.S.C. provides for de novo review only where previously authorized by statute. Thus, it is essential that the bill specifically provide for de novo review separate and distinct from any reference to 706(2). The language in the September 25 version of S. 2879 at section 11(d) accomplishes this objective and as such we strongly urge its adoption as written.

B. Stringency Standard for Cooperative Agreements

With respect to section 9(c)(2), which authorizes cooperative agreements between tribes, states, and the Office of Surface Mining, the provision in S. 2879 requires adoption under the cooperative agreement of the most stringent standards of any of the parties. The effect of this requirement is to force unilateral amendment of such agreements any time one of the parties makes its standards more stringent. To avoid this potentially confusing and inappropriate result, we urge adoption of alternative language requiring that any such agreements "adopt standards no less stringent than those required by the Secretary under a Federal Indian reservation lands program." This language is consistent with the present requirements for cooperative agreements between states and the Federal government and has consistently been used by Congress and the Interior Department with judicial blessing for many years.

C. Apparent Confusion Regarding State Jurisdiction over Off-Reservation Indian Lands.

Our reading of section 7 of the most recent draft of the bill regarding "Application of Regulatory Programs on Indian

Lands" leads us to conclude that there is apparently some confusion regarding jurisdiction over lands off the reservation. We understood that S. 2879 was intended to limit the jurisdiction of tribal regulatory authorities to Indian reservation lands only, except where a particular mining operation extends beyond the exterior boundaries of a reservation, in which case a cooperative agreement would be in order pursuant to section 9(c)(2) of the bill.

Section 7 implies that tribal regulatory authority exists outside the exterior boundaries of the reservation, where Indian lands are concerned. We support the language that appeared in section 4(a) of S. 2879 as originally introduced which stated that "Indian lands outside the exterior boundaries of any Federal Indian reservation shall be subject to the provisions of title IV and title V of SMCRA that apply to non-federal lands." In other words, any Indian lands outside the exterior boundaries of the reservations were to be treated as state lands to be regulated by the state.

Section 7 appears to miss the mark in its attempt to "amplify" the original intent of the bill. We would urge the Committee to clarify this situation in order to avoid needless confusion and inappropriate extensions of jurisdiction.

We appreciate the opportunity to present these views and urge the Committee to give them serious consideration. We also urge the adoption of S. 2879, as amended by the September 25 revisions and with the above recommendations.

Sincerely,

William E. Hynan
Robert W. Long

William E. Hynan
Senior Vice President
National Coal Association

Robert W. Long
Vice President
American Mining Congress

STATEMENT OF JUDY KNIGHT

VICE CHAIRMAN

UTE MOUNTAIN UTE TRIBE OF COLORADO

REGARDING S.2879

THE "INDIAN COAL MINING REGULATORY ACT OF 1984"

On behalf of the Ute Mountain Ute Tribe, let me thank the members of the Senate Select Committee on Indian Affairs for inviting the Tribe to submit our views regarding S.2879, The "Indian Coal Mining Regulatory Act of 1984." While we, along with many of our tribal colleagues, share specific concerns about various provisions in the bill, I firmly believe that these questions can be favorably resolved, and that the legislation thus improved can and should become law before the adjournment of the 98th Congress.

We would first like to note our agreement with the statement to the Committee by Alyce Spotted Bear, Chairman of the Three Affiliated Tribes of Fort Berthold. We share Fort Berthold's concerns with regard to surface-owner consent, preservation of tribal sovereign immunity and interpretation of the bill's language governing eligibility of tribes to submit regulatory programs for Secretarial approval, and hope that these difficulties can be fully and fairly resolved.

Besides these issues, however, we would like to raise two other concerns with S.2879 as introduced which go to the very heart of the theory and practice of tribal sovereignty, in particular the integrity of the tribal judicial system. These concerns relate to S.2879's handling of de novo review of tribal court decisions and primary criminal jurisdiction. With regard to both of them, we are furnishing with this statement proposed amending language which we feel would satisfactorily address our concerns.

De novo Review

Section 9 of S.2879 vests "tribal courts or any other tribal authority designated in an approved tribal program" with original civil jurisdiction under the Act. Section 9(d) makes tribal court judgments subject to the "scope of review" standards of the Administrative Procedure Act, 5 U.S.C.A. § 706(2), in effect treating such judgments as "agency actions" of an adjudicatory nature rather than judicial actions. But Section 9(d) goes beyond subjecting tribal court judgments to the APA's scope-of-review standards, by additionally mandating that all such judgment, on appeal to federal district court, be subject automatically to de novo review.

Imposing de novo review in this manner gives us great concern for the following reasons:

First, requiring de novo federal court review of all tribal court decisions would clearly be contrary to established principles of administrative law. Section 9(d) of S.2879 makes tribal court decisions subject to the "scope of review" standards of 5 U.S.C.A. § 706(2). Under § 706(2), federal district courts would retain broad latitude to reverse tribal court "action, findings, and conclusions found to be --

> "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law (5 U.S.C.A. § 706(2)(A);
>
> "contrary to constitutional right, power, privilege, or immunity (§ 706(2)(B));
>
> "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right (§ 706(2)(C);
>
> "without observance of procedure required by law (§ 706(2)(D));
>
> "unsupported by substantial evidence in a case subject to [Sections 556-57 of the Act, governing formal hearings and adjudications] or otherwise reviewed on the record of an agency hearing provided by statute (§ 706(2)(E)); or
>
> "unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court." (§ 706(2)(F)) (emphasis added).

The courts have interpreted § 706(2) to make de novo review of an administrative decision proper only under a limited set of circumstances. The U.S. Supreme Court has held that de novo review to determine if an "agency action" was unwarranted by the facts, is authorized in adjudicatory instances only when the court concludes that the agency's fact-finding procedures are inadequate. Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971). The Court has ruled that even where an agency has failed to explain its action and thereby frustrated effective judicial review, the proper remedy was not to hold a de novo hearing, but to obtain from the agency, either through affidavits or testimony, such additional explanation of reasons for agency decisions as may prove necessary. Camp v. Pitts, 411 U.S. 138, 93 S.Ct. 1241, 36 L.Ed.2d 106 (1973). Many cases may be cited for the proposition that the appropriate test on judicial review is whether the action below is supported by substantial evidence on the record viewed as a whole.

Our second fear is that because Section 9(d) expands the traditional de novo review requirements in administrative law only with respect to tribal court holdings, it would engender a belief that the factual record developed in tribal court is presumptively defective, and would thereby denigrate the tribal court system as a judicial institution and as an element of tribal self-government.

As the Committee well knows, the 1977 Surface Mining Act mandated a study of the various regulatory alternatives available regarding surface-mining operations on Indian lands. After taking a close look at the judicial systems of a number of tribes, the study concluded that:

> "Since the last part of the 19th century, Indian courts have developed from disciplinary instrumentalities of the federal government to sophisticated judicial tribunals exercising inherent powers of Indian self-government. Persons coming before the courts -- whether Indian or non-Indian -- are assured by federal law of receiving a fair trial consistent with due process and other protections. Further assurance that justice will be done is found in the dedication of tribes, Indian court judges, and the federal government to strengthening Indian courts through better funding, staffing, facilities and training.

> The unique role that tribal courts have played and will continue to play in tribal life mandates the continued attention of both tribal and federal leaders. Only tribal courts can administer justice in such a way as to maintain the delicate balance between contemporary legal requirements and traditional Indian cultural values." 1/

This proposed legislation marks an important milestone in the recognition of tribal self-government in theory and practice. It should not be marred by the establishment of a precedent that treats tribal courts as presumptively second-class judicial institutions. By striking Section 9(d)'s reference to de novo review and relying instead on the fully adequate protections of § 706(2), this legislation would properly ensure that each tribal court judgment is reviewed for procedural adequacies as it should be -- on a court-by-court, case-by-case basis.

Criminal Jurisdiction

Section 9 of S.2879 requires that tribal regulatory programs incorporate civil penalties no less stringent than those set forth in Section 518 of the 1977 Surface Mining Act, and, as stated above, gives tribal courts or other approved authorities original civil jurisdiction over alleged violations. Section 9(e)(2) of the bill, however, expressly bars tribal courts from exercising criminal jurisdiction over non-Indians. In fact,

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1/ The Control and Reclamation of Surface Mining on Indian Lands, Report Produced by the Council of Energy Resource Tribes for the Office of Surface Mining, U.S. Department of the Interior, 1979, pp. 5-30-31. (Hereinafter the "Indian Lands Study.")

S.2879 as a whole is silent altogether with regard to criminal sanctions for violations of the Act committed on Indian lands.

We feel very strongly that tribal courts should be given authority to enforce the criminal sanctions of Section 518 of the Act as against all alleged violators, individual or corporate, Indian or non-Indian. Accordingly, we are proposing legislative language for the Committee's consideration [Attachment A] that would: (i) give tribal courts criminal jurisdiction over alleged violators, but limited strictly to the enforcement of *Federal* Surface Mining law, and (ii) limit the criminal sanctions in a tribal regulatory plan to being no *more* stringent than those contained in Section 518 of the 1977 Act (fines of up to $10,000 and/or up to one year's imprisonment).

We believe this amendment is justified on the following grounds:

First, the amendment is *narrowly drawn* to achieve its single objective of exposing those who knowingly and willfully violate the Act on Indian lands subject to a tribal regulatory program or Federal Indian lands program, to criminal sanctions no more stringent than those they would face if the violation occurred on lands subject to the criminal penalties specified in Section 518 of the 1977 Act. Thus, the amendment would *not* expand tribal court criminal jurisdiction over non-Indians generally, but only in a very narrow way with respect to enforcement of *Federal surface mining control and reclamation law*. Furthermore, the criminal sanctions contained in a tribe's regulatory program, or proposed cooperative agreement, would be subject to Interior Secretarial approval; they would thus not be unduly harsh, inappropriate or unforseeable. Nor could they be more stringent than those maximum penalties under Federal law.

Second, tribal criminal jurisdiction can be extended in this manner without endangering due process.

A tribe's exercise of criminal jurisdiction in this area would be subject to the 1968 Indian Civil Rights Act (25 U.S.C. §§ 1301-1303), which requires that tribes observe many of the due-process and other limitations imposed by the Constitution on state and federal governments. Federal court *habeas corpus* is available to enforce these limitations. (It is worth noting that this Act, which originally only extended to "American Indians," was subsequently modified by Congress to cover "all Indians who may be subject to the jurisdiction of tribal governments, whether Indians or non-Indians.")

Third, such an amendment would ensure that the 1977 Act's clear intent that purposeful offenders face criminal prosecution, not be set aside, in effect, when the criminal act is perpetrated on an Indian reservation and the perpetrators are non-Indian. Any legal basis for limiting tribal criminal jurisdiction to Indians, vanishes when that jurisdiction is narrowly expanded to include a class of persons -- surface-mining interests on the reservation -- which by their very nature have had extensive, sustained commercial and physical contact with the reservation and its population.

Fourth, there is no reasonable basis for turning Indian reservations into a "refuge" within which accountability to the governing judicial body for criminal violations of Federal surface-mining law does not apply. The 1977 Act required of states seeking to regulate surface-mining reclamation operations, that their plans include civil and criminal sanctions no less stringent than those in the Act (30 U.S.C.A. § 1235(a)(2)). Backing off criminal sanctions and enforcement in the case of Indian lands only, would only serve to frustrate the effective implementation of Federal surface-mining law on Indian lands. And furthermore, the ability of tribal regulatory authorities to implement and enforce Federal surface-mining law -- directly or by cooperative agreement with the Secretary -- will clearly be diminished if they are given no recourse to criminal sanctions through the tribe's judicial system.

Fifth, extending narrow criminal jurisdiction to tribal courts would avoid a bifurcation of the Act's enforcement scheme into courts of different authority. As presently worded, the Act would encourage tribal prosecutors with substantial evidence of criminal wrongdoing to seek criminal sanctions against a surface-mining operator's Indian personnel -- likely to be junior-level employees -- while prosecution of non-Indian senior management might or might not subsequently occur in Federal court. Presumably the company itself could only be prosecuted in Federal court.

Sixth, it is well established that Congress clearly has the power to permit tribal courts to exercise jurisdiction with respect to non-Indians. The leading Supreme Court case on the subject, Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 98 S.Ct. 1011, 55 L.Ed.2d 209 (1978), denied a tribal court's *inherent* authority to impose criminal sanctions on non-Indians under *tribal* law. Furthermore, the Suquamish Court stated "the principle that Indian tribes may not assume criminal jurisdiction over non-Indians *without the permission of Congress*." 435 U.S. at 197-198, n.8

Seventh, Section 9 of S.2879 establishes a clear right of appeal to Federal district court for any tribal court judgment rendered pursuant to the Act.

Finally, we note again that tribal courts "have developed from disciplinary instrumentalities of the federal government to sophisticated judicial tribunals exercising inherent powers of Indian self-government. Persons coming before the courts -- whether Indian or non-Indian -- are assured by federal law of receiving a fair trial consistent with due process and other protections." [2/]

We urge the Committee to give careful consideration to revising S.2879 to remove the additional de novo requirement and extend narrowly circumscribed criminal jurisdiction to tribal courts. With the legislation modified to satisfy these concerns and those of our colleagues from Fort Berthold, S.2879 will gain our full support and encouragement for passage this Congress.

[2/] Indian Lands Study, pp. 5-30-31.

ATTACHMENT A

PROPOSED AMENDMENT REGARDING CRIMINAL JURISDICTION

AMENDING LANGUAGE

1. Amend Section 9(a) of S.2879 by striking, on page 12, lines 11 through 13, and inserting in lieu thereof the following:

> "known as the Indian Civil Rights Act, the civil and criminal penalty provisions of any tribal program shall incorporate civil penalties no less stringent than, and criminal penalties no more stringent than, those set forth in Section 518 of the Surface"

2. Amend Section 9(b) of S.2879 by inserting on page 12, line 19, after the word "civil," the words "and criminal."

3. Amend Section 9(e)(2) of S.2879 by striking on page 13, all of lines 13, 14, and 15, and inserting in lieu thereof the following:

> "(2) Nothing in this Act shall be construed as granting tribal courts criminal jurisdiction over any person who is not an Indian, with respect to the enforcement of provisions of law other than this Act and those of the Surface Mining Control and Reclamation Act of 1977 referred to in this Act."

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September 17, 1984

REC[illegible]

Honorable Mark Andrews
United States Senate
724 Hart Building
Washington, D.C. 20510

Dear Senator Andrews:

I am writing to clarify our position with respect to the recent joint letter you received from the coal companies and the tribes. That letter outlined the areas of S. 2879 where the coal companies had difficulty and where the tribes could reach compromise language. The tribes still have independent, remaining difficulties which must be addressed at mark up. The coal companies have no interest in these additional areas.

Division of off reservation tribal fund income derived from Indian coal

Request - The tribes request 50% of the tribal fund income that is generated from the mining of Indian coal located off the reservation.

Basis

Some tribes, such as the Crow Tribe, have no on reservation mining activity but do have a significant abandoned mine problem. Provision for off reservation tribal fund income would assure these tribes that their abandoned mine problem will be immediately addressed. The tribes are aware that the Secretary has failed to expend his discretionary monies earmarked for reclamation of abandoned mines in states where no mining is currently ongoing. The tribes wish to avoid this problem.

Secondly, the Secretary is currently sequestering 50% of AML monies derived from off reservation Indian lands. Entitlement to this money has already vested and S. 2879 must assure that tribes get this amount. Failure to do so would constitute an unconstitutional taking without due process. Tribes should not be put to the legal expense necessary to collect this money.

S. 2879 anticipates cooperative agreements between tribes and states in situations where the mine operation exists on both tribal and state lands. Unless tribes are entitled to income generated from these off reservation areas there will be no incentive for states to enter into such agreements. In effect, the cooperative agreement provision will become meaningless.

Lastly, tribes greatly need this money to develop their programs. Unlike states the tribes have fewer financial resources and little regulatory experience. It is vital that tribes have available to them adequate financial resources to meet their program needs. The tribes are willing to split this off reservation income 50-50 with the states.

Request - De Novo Review

The tribes would strike the de novo review requirement and limit review to the standards set forth in 5 U.S.C. §706.

Basis

The rationale for this has been clearly set forth in the letter of Robert Martin on behalf of the Ute Mountain Ute Tribe and we adopt that reasoning with respect to the de novo review issue.

Request - Most Stringent Standard

That language be included in the committee report which makes it clear that the "most stringent" standard in sec. 7(c)(2) is not intended to be used punitively by states to discourage the mining of Indian coal. Any state standards that are applied must be the same as those generally applicable throughout the state.

Basis

It is my understanding that the Crow Tribe opposes this provision. The Crow Tribe is currently involved in extensive and bitter litigation with the State of Montana regarding the "ceded strip". The Crow Tribe fears that if the State of Montana is unsuccessful in this litigation they may well use this section in a punitive fashion. Report language clarifying that this section refers to state standards generally applicable throughout the state would ease the tribe's reasonable fears on this point.

It should also be made clear that this section relates to the regulation and reclamation of existing mines and is not intended to inhibit the opening of new mines. It is the regulatory rather than the permitting function that is affected by this section.

Request - Archaeological Provisions

That strong language be put in the committee report reinforcing and clarifying the intent of this section.

Basis

The tribes have agreed to the changes proposed by industry with the understanding that the regulations to be developed by the Secretary must provide for the protection and/or proper removal of artifacts which are discovered in areas subject to imminent mining activity.

The tribes are also insistent upon maintaining the confidentiality of specific locations containing archaeological materials. This information must be kept from pot diggers, grave robbers, etc.

It is also important that this section specifically vest title to these objects to the tribe that the remains are archaeologically associated with.

Request - Litigation Impact

This legislation must not affect ongoing litigation affecting the "ceded strip". Language needs to be adopted clarifying this.

Basis

The Crow Tribe is involved in current litigation wherein they assert the right to tax coal mining activity on the ceded strip. They are also involved in litigation with Montana regarding the tribe's right to AML funds from the ceded strip. This bill is directed solely toward regulation and reclamation and must not be seen as impacting these other issues.

Request - Surface Owner Consent

That compromise language be adopted that would permit the Crow, Fort Berthold and Ute Mountain Utes to mine their coal at their option.

Basis

The surface owners took their surface interest subject to the coal ownership interest. The compromise language suggested by the Ute Mountain Ute is a reasonable position.

Request - Hopi/Navajo Jurisdiction

That the position of the two affected tribes be accorded great weight on this matter.

Basis

Industry has suggested language that would address jurisdiction between the Hopi and Navajo. We take no position on this but leave it up to the tribes to work out among themselves.

In conclusion, I would like to thank you for your efforts on behalf of S. 2879 and hope that my above suggestions are useful.

Sincerely,

Henry J. Sockbeson

HJS/mb

Shell Mining Company
P.O. Box 2906
Houston, TX 77252

SUBSIDIARY COMPANIES
R&F COAL COMPANY
TRITON COAL COMPANY
TURRIS COAL COMPANY

Jack L. Mahaffey
President

August 27, 1984

The Honorable Mark Andrews, Chairman
Select Committee on Indian Affairs
U. S. Senate
Washington, D.C. 20510

Dear Senator Andrews:

RE: S.2879 - INDIAN COAL MINING REGULATORY ACT OF 1984

Shell Mining Company has reviewed Senate Bill 2879, entitled "Indian Coal Mining Regulatory Act of 1984," particularly as it relates to Shell's agreement with the Crow Tribe of Indians to mine coal on the Crow Reservation in Montana. The general finding is that this legislation, if passed in its present form, would adversely impact the prospects for our developing the Crow lease. The attached comments were developed to suggest changes that, in our opinion, would make the measure more workable and supportable.

As I indicated in correspondence on August 8, we appreciate your invitation to comment.

Sincerely,

HLB:amc

Attachment

cc: w/attachment

United States Senate
The Honorable John Melcher, Select Committee on Indian Affairs

COMMENTS OF SHELL MINING COMPANY ON S.2879

THE PROPOSED "INDIAN COAL MINING REGULATORY ACT OF 1984"

Shell Mining Company appreciates the opportunity to submit comments to the Senate Select Committee on Indian Affairs on Senate Bill 2879, the proposed "Indian Mining Regulatory Act of 1984." This legislation would be of particular importance to Shell because of Shell's agreement with the Crow Tribe of Indians which was approved by the Secretary of the Interior in 1983. Under the Crow/Shell Agreement, Shell has the right to mine coal from 2560 acres of land on the Crow Reservation in Montana and options, exercisable under certain conditions, to mine coal from an additional 5120 acres of land on the Reservation. The Crow/Shell Agreement was the result of long and difficult negotiations between Shell, the Tribe, and the Department of the Interior. (The United States' approval of this agreement was greatly facilitated by the passage of the Indian Mineral Development Act of 1982 sponsored by Senator Melcher.) These negotiations, Shell's investment in these coal reserves, and the decisions Shell will face during the next several years as it decides to what extent to exercise its rights under the Crow/Shell Agreement, give Shell a unique perspective to comment on this proposed legislation.

As the Committee is well aware, several Indian reservations in the west contain significant and valuable coal reserves. Shell can certainly understand that the tribes that possess coal resources desire to have a voice in the regulation of the mining of these coal deposits. At the same time, if regulation on tribal land becomes substantially more onerous or subject to greater uncertainties than would be the case for mining on lands with comparable reserves off of reservations, coal companies will tend to make their investments elsewhere. This is particularly the case when, as now, the coal market is soft.

Shell has identified five areas in which, in Shell's opinion, this bill would provide either more stringent regulation of mining on Indian lands than would be the case anywhere else in the United States, or cause greater uncertainty as to the economics of potential development of Indian coal resources compared to non-Indian coal. These more stringent or uncertain areas are: 1) the historical, archeological, and cultural review by the Tribes called for in Section 14 of the bill, 2) the possibility of dual and shifting regulation arising from partial, phased Indian SMCRA programs (Section 6), 3) allowing tribes to bring civil enforcement actions in tribal courts with federal court review available only after the tribal court has issued a final ruling (Section 9), 4) imposing surface owner consent requirements on Indian lands (Section 8), and 5) the possibility that certain Indian regulators will have a conflict of interest that would impede fair and impartial regulation (Section 13). It is Shell's view that, in their current form, these provisions would significantly discourage development of coal on Indian reservations.

Turning to the first of these areas, Section 14 of the bill would require an unrestricted historical, archeological, and cultural resources investigation of any proposed mining area on Indian lands. These investigations would have to be complete and would have to be reviewed by the Tribe before any further consideration of the mining permit application could occur. Shell objects to Section 14 in its current form on several grounds:

- The archeological, cultural, and historical review under this statute could be duplicative of reviews under other statutes.

- There are no criteria set forth in the bill as to how the studies will be conducted or evaluated and no indication that any such criteria will be provided by regulation.

- Section 14(c), which provides that the information derived from the archeological, historical, and cultural investigation will only be made public when the permit application is deemed complete by the tribe, may give the tribe the ability to delay the entire permit even though that tribe has not yet developed an approved SMCRA program.

Elaborating on these points, Section 14 of this bill would appear to be duplicative of the Archeological Resources Protection Act of 1979 which provides:

> In the case of any permits for the excavation or removal of any archeological resource located on Indian lands, the permit may be granted only after obtaining the consent of the Indian or Indian tribe owning or having jurisdiction over such lands. The permit shall include such terms and conditions as may be requested by such Indian or Indian tribe. 16 U.S. CODE §470cc(g)(2).

Further, there are already regulations in place under the authority of the Antiquities Act of 1906 governing appropriation, excavation, injury or destruction of any historic or prehistoric ruin or monument, or any object of antiquity on Indian lands controlled by the United States. 25 C.F.R. Part 261.

In addition to being duplicative of existing statutory and regulatory authority over activities which might affect archeological, cultural or historical resources on tribal lands, the language of Section 14 provides no limits whatsoever as to (1) the scope of the tribe's investigations on these subjects, (2) the scope of the tribe's review of these investigations, (3) the manner in which either the investigations or the tribal review would be conducted, (4) the time period in which they will be concluded, (5) the costs associated with the study and the investigation and who will pay them, or (6) what mitigation measures, if any, could be ordered as a result of the study. If a requirement like that contained in Section 14 is to remain in the bill, Shell suggests that standards be set out so that development of the tribe's mineral resources can proceed with due regard being given to preservation of historical, cultural, and archeological resources. The establishment of standards for any investigations and tribal reviews of investigations are important, not only in the context of regulating how an actual investigation or tribal review will be conducted, but also in reassuring potential mineral developers on Indian lands that these investigations and review processes will be conducted in a reasonable manner.

Finally, concerning Section 14, the language of Section 14(c) may have unintended consequences. It currently provides that the results of the investigation of archeological, cultural, and historical matters will be included in the mine permit application only when the tribe deems the permit to be complete. Even though the tribe in question does not yet have an approved tribal SMCRA program (and therefore would not have jurisdiction over the issuance of the permit), this provision may nevertheless give the tribe veto power over all aspects of the permit. In other words, if the tribe considered some aspect of the permit application incomplete, even though such section were totally unrelated to archeology or culture, the tribe could delay the processing of the permit by refusing to allow the Section 14 report to be made a part of the application.

The second principal area of concern with this bill deals with Section 6 which authorizes a tribe to adopt a partial, phased program for the regulation of surface mining "to be implemented over such period of time as may be necessary for the development of expertise in the technical, scientific, administrative, and judicial aspects of the program." The problem with this provision from a mining company's standpoint is that it exposes the mining operations to *dual, possibly overlapping, and perhaps even inconsistent, regulation* by two different governments. Obviously, it is inherent in a partial program that there would be two different government entities to deal with, and it is inherent in a phased program that regulation will shift from one government to another. This phasing may cause problems, because, just as a problem is worked out with one regulator, the jurisdiction over that area may shift. Also, it is certainly possible that both levels of government may claim jurisdiction (or conversely may assert they do not have authority) over a particular matter based on that government's interpretation of its authority. This situation could leave the mining company in a quandary as to how to proceed.

The worst, and certainly not inconceivable, situation arising from a partial, phased program would be for each government to issue an order that is inconsistent with the other government's directive. For example, contemporaneous reclamation of a mining area could be beneficial for reestablishing hydrologic balances, wildlife resources, and revegetation but, at the same time, be harmful to some discovered archeological artifact. If OSM had jurisdiction over reclamation activities in general, but the tribe had authority over cultural resources conservation, each government could issue mutually exclusive directives as to how that particular reclamation activity should be performed.

These potential problems of partial and shifting regulation of SMCRA programs on Indian lands discussed above, would be another factor that would make mining on Indian lands less favorable in the eyes of a coal company than mining elsewhere. Presumably, mining companies would be influenced by this difference in making decisions as to where to invest in or develop mineral resources.

A better solution to the problem of some tribes being unable to take on full SMCRA regulatory authority initially would be to keep all regulatory authority with OSM until the tribes could completely take over regulation. In the meanwhile, OSM could, by statutory mandate, if this is considered desirable, consult with the tribe in regulating mining on that reservation. Further, OSM could provide assistance in enabling the tribe to develop the capacity to implement a complete SMCRA regulatory program.

The next area of the bill that is disturbing to Shell is contained in Section 9. That section allows tribal courts and other tribal authority designated in an approved tribal program to impose civil penalties for violating the tribal SMCRA program. It also permits the tribe to bring suit in tribal court to recover civil penalties, and it provides an appeal from a final tribal court judgment to be appealed to federal district court for a trial de novo.

Shell believes that giving tribal courts civil jurisdiction to try SMCRA violations and enforce SMCRA fines will significantly impede development of Indian coal resources. In negotiating the Crow/Shell Agreement, the parties agreed to several dispute resolution mechanisms, most notably, arbitration, to avoid disputes being resolved within tribal court. It is doubtful Shell would have signed the Crow/Shell Agreement if these arbitration provisions had been absent.

Shell believes that its discomfort from the prospect of being a defendant in tribal court would be shared by other potential mineral developers on Indian lands. Shell has no experience in tribal court. It does not know who it could hire to represent it in tribal court that would be familiar with that court's procedures and who would not have economic ties to the tribe amounting to an almost certain conflict of interest. Shell is not aware of how long it would take a tribal court to reach a decision. There are few, if any, precedents that Shell or another mining company could study from tribal courts to evaluate what the likely outcome of any dispute would be.

The bill does contain a de novo review provision allowing new trials in federal court of controversies tried in tribal courts, but that review provision only applies to final orders of a tribal court. A tribal court could issue interim or preliminary orders that would significantly affect or even halt mining. Months or years might then elapse before a final tribal court decision was issued. Only then could any appeal be taken to federal court.

Shell strongly urges that original jurisdiction to try civil tribal SMCRA cases rest in federal district court. If, however, Congress does give tribal courts such original jurisdiction, Shell suggests that an immediate appeal to federal court be permitted from any order of a tribal court that stops or significantly impedes mining activities.

A fourth general area of concern that Shell has with this proposed legislation is the surface owner consent requirement contained in Section 8. As the Committee knows, reservation lands are unique in that title to large amounts of land are held by the United States in trust for individual Indians. While in a sense these are federal lands, these allotted tracts are certainly different in character than federal lands held in trust for the nation at large. Another predominate feature to these allotted Indian lands is that many tracts are held in trust for several individuals who hold undivided equitable ownership interests in the lands. It is frequently more difficult to obtain consent of all the undivided interest holders than it would be from individual owners, and sometimes it is impossible to achieve unanimous approval of all the holders of undivided interests. Shell wishes to advise the Committee that it has had considerable experience in attempting to purchase surface ownership interests on Indian lands, and such acquisition is a difficult and time consuming process.

Congress has recently recognized these difficulties in dealing with multiple beneficial owners of Indian lands. In 1983, Congress enacted the

Indian Land Consolidation Act which, in some instances, permits the persons holding a majority of the ownership interests in a particular tract to make decisions binding on all owners. 25 U.S. CODE §2201 et seq.

Congress has also obviously recognized the unique ownership structure of Indian lands when it enacted SMCRA because SMCRA exempts Indian lands from the surface owner consent requirement imposed on other federal lands. 30 U.S. CODE §1304(f). Shell believes that this was a wise exception to make and that this exception of Indian land from the surface owner consent requirement should be maintained.

If the surface owner consent requirement must be imposed on Indian lands, then Shell suggests that a "majority rules" provision, such as the one contained in the Indian Land Consolidation Act, be made applicable in the case of land held in trust for several Indians. Secondly, obtaining surface owner consents should not be a prerequisite to obtaining a mining lease or agreement. At most, it should be a requirement for such consents to be in hand before actual mining occurs that disturbs the surface in question.

Negotiations to obtain consents on tribal trust lands can be unusually protracted because of common multiple ownership interests and because the Bureau of Indian Affairs must approve each transaction after an agreement is reached. It is not practical to obtain these consents before it is certain that a lease or mineral agreement will be issued. Finally, if a surface owner consent requirement is imposed by legislation enacted now, it should be made clear that this requirement does not impair the validity of existing agreements and that amendments to such agreements may be processed by the Department of the Interior even though all surface consents have not yet been obtained.

The final way in which Shell believes this bill would create uncertainties in the mining of Indian coal resources that would not exist for mining elsewhere is the provision in the legislation which permits an Indian SMCRA program to be regulated by persons who have a conflict of interest by virtue of this tribal membership. Specifically, Section 13(a) provides that a person may serve in an Indian regulatory program even though such person has a significant financial interest in the outcome of his regulatory activities because of his membership in the tribe.

The potential conflict permitted by this language could become an actuality in several ways. For example, a regulator could stand to receive a substantial amount of money from a tribal distribution of money funded by revenue from a particular mine. Also, the tribe might be a joint venture partner in one mine on the reservation, but not in others. This would give individual regulators a reason to favor one mine over others.

As the Committee knows, many tribes have relatively small populations. Therefore, revenue items which, in the case of a state or the federal government, would be of no personal significance to an individual citizen could be of much larger personal importance to an individual Indian. Therefore, even SMCRA fines, when aggregated over time, could be a material item in the Tribe's budgeting and not an insignificant item to the regulator personally.

While this is a difficult issue, Shell believes that all significant conflicts of interest should be avoided in the administration of Indian SMCRA programs, including those which arise from tribal membership. If it is not possible to build such safeguards into a program which a tribe would administer, then the administration of such programs should remain with OSM, with the Tribes having a consulting role.

Again, Shell appreciates the invitation to comment on this legislation, and will be happy to respond to any questions that any committee members or staff members may have concerning Shell's remarks.

STATEMENT OF ALYCE SPOTTED BEAR
CHAIRPERSON
THE THREE AFFILIATED TRIBES OF THE
FORT BERTHOLD INDIAN RESERVATION
TO THE SENATE SELECT COMMITTEE ON INDIAN AFFAIRS
WITH REGARD TO S.2879,
THE "INDIAN COAL MINING REGULATORY ACT OF 1984"

The Three Affiliated Tribes of the Fort Berthold Indian Reservation are pleased to have the opportunity to submit this statement regarding S.2879, the proposed "Indian Coal Mining Regulatory Act of 1984." Senators Metcher and DeConcini are to be highly commended for their Senate sponsorship of this legislation, which is long overdue, and which constitutes an important milestone toward the effective implementation of regulatory authority over surface coal-mining activities on Indian lands.

The present-day Fort Berthold Reservation comprises slightly under one million acres in west central North Dakota. Under our lands there are over one billion tons of coal reserves, much of which is viewed as potentially surface-minable at today's coal prices. While none of our proven tribal reserves are presently being commercially mined, we believe that they are nonetheless a central component of our natural resource base, and that their prudent development may, in the not-too-distant future, become an important aspect of our overall tribal economic development plans. Hence, the passage of S.2879 is of great importance to us, as it is to other Indian tribes with producing or proven but untapped coal deposits. We wholeheartedly support its enactment in this Congress with certain amendments specified below.

Our principal concern with the present language of S.2879 relates to Section 8. This section applies to "split estate" lands where subsurface coal rights are held by the United States in trust for an Indian or Indian tribe, while surface rights are privately held by another (often non-Indian) owner. As presently worded, Section 8 of S.2879 would make applicable to coal-bearing Indian lands, certain provisions of the 1977 Surface Mining Control and Reclamation Act ("SMCRA") which preclude the Secretary of the Interior from approving a coal lease for a split-estate unless the surface owner has given written consent to the lease.

Such split estates are not uncommon in Indian country, especially on those reservations which -- as in Fort Berthold's case -- saw large parcels of land opened to homesteading and/or allotment. In the case of Fort Berthold, however, the coal lands of our Reservation were originally reserved from sale to homesteaders under the Act of June 1, 1910, 36 Stat. 455, as tribal coal reserves. These coal lands were ultimately opened to allotment with an express reservation of the coal to the Tribes, "and of the right to prospect for, mine, and remove the same. . ." Act of April 3, 1912, 37 Stat. 631. Those who purchased surface-rights pursuant to such statutes had clear notice that coal rights had been reserved, and furthermore, that their eventual development was a very real possibility.

Accordingly, we are gravely concerned by the present language of Section 8(a) of the bill, and strongly urge the Committee to amend the language so as not to require surface-owner consent "where subsurface mineral rights have been specifically reserved to a tribe by statute."

We believe that not to adopt such an amendment -- but to give surface-owners in such instances, the ability to effectively "veto" tribal coal-development plans -- amounts to an unconstitutional "taking." The tribal reserved coal right is a "property right" protected by the Fifth Amendment to the U.S. Constitution, which provides:

> "nor shall private property be taken for
> public use, without just compensation."

Mining rights are recognized as private property within the meaning of the Fifth Amendment. United States v. Northern Transportation and Trading Co., 253 U.S. 330 (1920), aff'd 53 Ct. Cl. 424 (1918); Freese v. United States, 639 F.2d 754, 757 (Ct. Cl.), cert. denied, 454 U.S. 827 (1981). The enactment of a provision allowing owners of the surface estate to prevent a tribe's exercise of its right to mine would, in effect, significantly diminish the value of the retained tribal property rights. Surface owners would not, realistically speaking, be expected to give consent without receiving additional financial consideration therefor. This, then amounts to a "taking" barred under the Fifth Amendment absent the payment of "just compensation."

We believe it is also the case that requiring surface-owner consent in such instances, would operate as a direct impediment to the exercise of tribal sovereignty. An inherent attribute of tribal sovereignty is the ability to regulate the speed, manner and scope of development of natural resources on and underlying tribal lands. Indeed, the proposed Indian Coal

Mining Regulatory Act of 1984 is an important step in this direction. It is wholly inadvisable therefore, as a matter of policy, to allow unfettered restriction of tribal authority to develop coal -- where that authority was explicitly recognized by statute preceding sale or allotment of surface estates -- by giving surface owners veto power over development.

Second, we are also very concerned that Section 10(b) of the bill appears to authorize suits against a Tribe under Section 520(a)(1) of SMCRA for an alleged violation of any regulation, order or permit under the Act. We believe that this ambiguity with regard to the legislation's intent to preserve tribal sovereign immunity, can be easily corrected by adding a new Section 10(d) to read:

> "(d) Nothing in this Act shall be construed as to waive tribal sovereign immunity."

Such an amendment would clarify that Section 10 is intended to authorize civil actions by private persons against the Secretary of the Interior to compel compliance (Section 10(a)), and/or against any other non-tribal governmental instrumentality or agency or any other person alleged to have violated the 1977 Surface Mining Act, as provided under Section 520 of the Act (Section 10(b)).

It has long been recognized that Indian tribes are immune from suits of this type unless the Congress waives the sovereign immunity of the tribe. Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978). Although the Congress does have the authority to waive tribal sovereign immunity, such a waiver must be clearly expressed and is to be strictly construed. Turner v. United States, 248 U.S. 354 (1919). See, Namekagon Dev. Co. v. Bois Forte Res. Housing Authority, 417 F.2d 508, 509 (8th Cir. 1975).

Even more fundamentally, actually waiving tribal sovereign immunity would not advance any purpose of this Act. Although Congress does have the authority to waive tribal sovereign immunity, it should not do so absent a clear showing that such a result is necessary to advance a particular overriding federal interest. Section 10 of S.2879, as clarified by our proposed amendment, sets forth an entirely adequate set of remedies against the Secretary of the Interior or other persons for an alleged tribal violation of the Act, or alleged failure to perform a duty under the Act. Citizens' suits against the Secretary to compel tribal compliance with the law are consistent with the trust relationship which exists between tribes and the federal government. This is especially true given the broad Secretarial approval authority with respect to tribal regulatory programs under the Act.

Our third and final concern relates to possible misinterpretation of the language in Section 6(a)(1) of the bill, dealing with eligibility of tribes to submit regulatory programs for approval by the Secretary of the Interior. We urge the Committee to adopt report language reading as follows:

> "Section 6(a)(1) of S.2879 authorizes a tribe to submit a tribal regulatory program for Interior Secretarial approval if surface coal-mining operations 'are or may be conducted'

> within the reservation. The Committee intends, by use of this term, to authorize submission of plans by any tribe with ongoing coal mining or reclamation operations, or with proven subsurface reserves of commercially surface-minable scope."

The proposed language is needed to ensure that the term "may be conducted" will not be erroneously interpreted in a restrictive sense, so as to foreclose a tribe from submitting a regulatory program until such time as actual mining operations are about to begin; _i.e._, after all regulatory approvals have been granted, commercial arrangements are in place, etc. Tribes like Fort Berthold -- with proven reserves in commercial quantities, but with no ongoing development -- should not be discouraged from taking appropriate steps to put a tribal regulatory scheme in place in advance of actual development.

This concludes our statement. Let us express, once again, our support for this legislation as modified by these suggested amendments as vital to our efforts to manage the development of our coal resources, and our gratitude to Senators Melcher, DeConcini and other members of the Committee for moving the measure toward enactment this Congress.

* * *

September 10, 1984

The Honorable Mark Andrews
Chairman
Select Committee on Indian Affairs
United States Senate
838 Hart
Washington, D. C. 20510

Dear Mr. Chairman:

The organizations represented by the undersigned have entered into lengthy discussions to resolve differences and jointly suggest amendments to S. 2879, the Indian Coal Mining Regulatory Act of 1984.

Our aim is to try tc find common grounds on which we could support enactment of the bill in the remainder of the 98th Congress. We are happy to report that our efforts have, for the most part, been successful, and we herein enclose a series of amendments for consideration by the Select Committee on Indian Affairs. Subject to the adoption of these amendments, we jointly recommend that S. 2879 be marked up at the earliest possible date and placed on the calendar of the full Senate.

The two areas of disagreement concern the provision requiring *de novo* review of tribal court judgments and the requirement in Section 7(c)(3) requiring that cooperative agreements adopt the most stringent standards of any of the participants to the agreement. Basically, the tribes agree to Federal court review but feel that *de novo* review implies a *de facto* presumption that tribal courts are inadequate and is therefore unacceptable. Industry feels that the reviewing courts should have firsthand access to all the evidence before making a judgment.

With respect to Section 7(c)(3), the environmental groups represented feel that the present language of S. 2879 is appropriate, and the tribal representatives support this position. Industry representatives, on the other hand, feel that the revised language incorporated in the enclosed amendments is consistent with SMCRA and it would prevent unilateral amendment of cooperative agreements if one party adopts more stringent standards.

We would also request a meeting with you at your earliest convenience to discuss our proposed amendments.

Sincerely,

Chris Farrand
Chris Farrand
Peabody Holding Company, Inc.

Henry Sockbeson
Native American Rights Fund

William Hynan
National Coal Association

Eric Eberhard
The Navajo Nation

Robert W. Long
Robert Long
American Mining Congress

98TH CONGRESS
2D SESSION

S. 2879 - As Amended.

To provide for cooperation between the Secretary of the Interior and Indian tribes with respect to the regulation of coal mining operations on Indian reservation lands and the acquisition and reclamation of abandoned mines on such land, and for other purposes.

IN THE SENATE OF THE UNITED STATES

JULY 27 (legislative day, JULY 23), 1984

Mr. MELCHER (for himself and Mr. DECONCINI) introduced the following bill; which was read twice and referred to the Select Committee on Indian Affairs

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A BILL

To provide for cooperation between the Secretary of the Interior and Indian tribes with respect to the regulation of coal mining operations on Indian reservation lands and the acquisition and reclamation of abandoned mines on such land, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Indian Coal Mining Regulatory Act of 1984".

SEC. 2. The Congress finds and declares that—

(1) there exists between the Government of the United States and Indian tribes a special and unique trust relationship;

(2) as part of that trust relationship, congressional policy favors tribal self-determination which recognizes the special cultural values and identities of Indian tribes;

(3) Indian tribes own and control an estimated 15 per centum of the country's coal resources which may be recovered by surface mining, including nearly one-third of the low-sulfur strippable coal of the Western United States;

(4) surface mining operations on Indian lands result in disturbances of surface lands that may temporarily adversely impact the commerce, public welfare, and environment of Indian reservations;

(5) the governmental responsibility for regulating surface mining and its effects on Indian reservations should rest with the Indian tribes at their election; and

(6) because the jurisdictional status of Indian lands is unique, it is necessary to provide for surface mining regulation thereon by legislation separate from that enacted to apply to other lands throughout the United States.

DEFINITIONS

SEC. 3. For the purposes of this Act—

(1) The term "Indian lands" means all lands, including mineral interests, within the exterior boundaries of any Federal Indian reservation, notwithstanding the issuance of any patent, and including rights-of-way, and all lands including mineral interests held in trust for or supervised by an Indian tribe.

(2) The term "tribal regulatory program" means a full or partial program established by an Indian tribe to regulate surface coal mining and reclamation operations on Indian reservation lands in accordance with the requirements of this Act and regulations promulgated pursuant thereto.

(3) The term "Federal Indian lands program" means a program for Federal regulation of surface coal mining and reclamation operations on Indian reservation lands in accordance with this Act in the absence of, or in conjunction with, a full or partial tribal regulatory program.

(4) The term "tribal regulatory authority" means the department or agency in an Indian tribe that has primary responsibility at the tribal level for administering this Act.

(5) The term "Secretary" means the Secretary of the Interior.

APPLICATION OF PROVISIONS TO INDIAN LANDS

SEC. 4. (a) Indian lands outside the exterior boundaries of any Federal Indian reservation shall be subject to the provisions of title IV and title V of the Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. 1231–1279) that apply to non-Federal lands.

(b) Indian lands within the exterior boundaries of any Federal Indian reservation shall be subject to the provisions of this Act.

(c) Nothing in this Act shall be construed to confer regulatory authority or jurisdiction to one tribe within lands partitioned to the other tribe in accordance with the provision of 25 U.S.C.A subchapter XXII.

TRIBAL ABANDONED MINE RECLAMATION FUND

SEC. 5. (a)(1) There is hereby created within the Treasury of the United States a trust fund to be known as the Tribal Abandoned Mine Reclamation Fund (hereinafter referred to as the "Tribal Fund") which shall be administered by the Secretary of the Interior. The Tribal Fund shall be administered separately from, and without regard to, the Abandoned Mine Reclamation Fund created under the Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. 1231).

(2) The Tribal Fund shall consist of—

(A) Fifty per centum of amounts deposited pursuant to section 401(b) of the Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. 1231(b)) which were generated by mining activities within the exterior boundaries of Indian reservations prior to the date of enactment of this Act; and

(B) Fifty per centum of funds hereinafter collected from mining activity on such lands pursuant to section 401(b) of such Act.

(3) The balance of funds referred to in paragraph (2) may be expended in any State or to any Indian tribe at the discretion of the Secretary in order to meet the purposes of this Act and title IV of the Surface Mining Control and Reclamation Act of 1977. Such funds may be expended directly by the Secretary or by making additional grants to approved State reclamation programs pursuant to section 405 of the Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. 1235) or to approved tribal regulatory programs pursuant to section 5 of this Act when the Secretary finds that such programs are the best means of accomplishing the specific reclamation projects. The Secretary shall consult and coordinate with the respective States or tribes those projects funded directly or in conjunction with other Federal agencies.

(b) The Secretary of the Interior shall invest, on a quarterly basis, all receipts accruing to the Tribal Fund. Such investments shall be in public debt securities with maturities suitable for the needs of the Tribal Fund and bearing interest at rates determined by the Secretary of the Treasury, taking into consideration current market yields on outstanding marketable obligations of the United States of comparable maturities. The income on such investments shall be credited to, and form a part of, the Tribal Fund.

(c)(1) All funds in the Tribal Fund shall be expended on Indian lands to meet the purposes of this Act.

(2) Eighty-five per centum of the funds deposited in the Tribal Fund annually shall be allocated by the Secretary to the Indian tribe having the ownership interest.

(3) In the event of multiple tribal ownership interests in the coal, the funds shall be allocated to the Indian tribes under paragraph (2) of this subsection in direct proportion to their ownership interests.

(4) The balance of the funds collected on an annual basis pursuant to subsection (c)(2) shall be expended, upon appropriation, on Indian lands, including those Indian lands from which no funds have been derived but which have been adversely affected by past

mining and should be reclaimed to meet the purposes of this Act. Such funds may be expended directly by the Secretary or by making grants to approved tribal reclamation programs pursuant to section 3 of this Act. The Secretary shall consult and coordinate with the respective Indian tribes regarding those projects funded directly or in conjunction with other Federal agencies.

(d) Notwithstanding paragraphs (2) and (4) of subsection (c) of this section, all funds identified in subsection (a)(2)(A) of this section, and through the end of the reporting quarter which includes the date of enactment of this Act, shall be allocated to those Indian tribes from whose lands such funds were derived.

(e) Indian tribes, pursuant to an approved tribal abandoned mine reclamation plan, or the Secretary in the absence of an approved plan and in consultation and coordination with the Indian tribe, may expend funds appropriated from the Tribal Fund based upon the needs and priorities established by the Indian tribes. Funds may be exposed for—

(1) the purposes set out in sections 403 and 409, and subsection (g) of section 402 of the Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. 1233; 1234; 1232(g)); and

(2) the development and maintenance of scientific, administrative, judicial, or technical capabilities;

(3) provision of facilities for training and research; and

(4) other activities necessary for the development and implementation of tribal programs under this Act.

The Secretary shall assure sufficient funds are made available annually to carry out the purposes described in paragraphs (2) and (3).

TRIBAL REGULATORY PROGRAMS

SEC. 6. (a)(1) If surface coal mining operations are or may be conducted within the exterior boundaries of the reservation of any Indian tribe, such Indian tribe may submit to the Secretary a tribal regulatory program.

(2) An Indian tribe may, at its discretion, adopt a partial, ~~phased~~ program for the regulation of surface mining, to be implemented over such period of time as may be necessary for the development of expertise in the technical, scientific, administrative, and judicial aspects of the program. The decision whether to pursue full or partial regulatory authority, and the time required for development of full regulatory authority, shall rest solely with the Indian tribe.

"Partial programs shall be developed in accordance with the procedures set forth in Section 7(c) of this Act."

~~(3) Secretarial approval of a tribal program may include phasing, as provided in paragraph (2) above, and an expected sequence of actions over time in order to assure the full realization of the objectives of the tribal program.~~

(b) the Secretary is authorized to approve a tribal abandoned mine reclamation program prior to the Indian tribe's adoption of a full or partial tribal regulatory program as provided by this Act.

(c)(1) The Secretary shall approve or disapprove a tribal regulatory program in whole or in part, within six calendar months after the date such program is submitted to the Secretary.

(2) If the Secretary disapproves any tribal regulatory program, in whole or in part, he shall notify the Indian tribe in writing of this decision and set forth in detail the reasons for the denial. The Indian tribe may resubmit a revised tribal program, or portion thereof, within ninety days from the date of receipt of the Secretary's decision.

(3) The Secretary shall approve or disapprove the resubmitted tribal regulatory program or portion thereof within ninety days after the date of resubmission.

(d) With respect to the application of sections 501(a) and 502 of the Surface Mining Control and Reclamation Act (30 U.S.C. 1251(a); 1252), the actions taken by the Secretary pursuant to subsections (c) and (d) of section 710 of such Act (30 U.S.C. 1300(c)-(d)) shall remain in effect until the day after the day of approval of a full or partial tribal program, or a Federal Indian lands program.

(e) Within six months after the date of enactment of this Act, the Secretary shall prescribe and publish in the Federal Register regulations concerning tribal regulatory programs consistent with and in accordance with the Surface Mining Control and Reclamation Act of 1977 and the provisions of this Act. Such regulations shall also include those standards and procedures necessary for the formulation, implementation, and assumption of administrative and judicial responsibilities, including the secretarial approval therefor, pursuant to this Act.

FEDERAL INDIAN LANDS PROGRAMS

SEC. 7. (a) ~~As soon as practically feasible, but not later than eighteen months following the date of enactment of this Act, the Secretary shall implement a Federal Indian lands program for those aspects of titles V and VII of the Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. 1201–1328) which have not been assumed by an Indian tribe under an approved tribal regulatory program as provided for in this Act. Such Federal Indian lands program shall, at a minimum, be consistent with and in accordance with an approved State or Federal permanent lands program for the State in which the Indian lands are located.~~

"Sec. 7(a) As soon as practically feasible, but not later than eighteen months following the date of enactment of this Act, the Secretary shall implement, promulgate, and publish in the Federal Register regulations establishing a Federal Indian lands program under the provisions of titles V and VII of the Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. 1201 1328), where full regulatory authority has not been assumed by a tribe under an approved tribal regulatory program as provided for in the Act. Such Federal Indian lands programs shall, at a minimum, be consistent with and in accordance with an approved State or Federal permanent lands program for the state in which the Indian lands are located. Such regulations, which shall be concise and written in plain, understandable language shall not be promulgated and published by the Secretary until he has --

(1) published proposed regulations in the Federal Register and afforded interested persons, Indian tribes and State and local governments a period of not less than thirty days after such publication to submit written comments thereon; and

(2) held at least one public hearing on the proposed regulations. The date, time and place of any hearing held on the proposed regulations shall be set out in the publication of the proposed regulations. The Secretary shall consider all comments and relevant data presented at such hearing before final promulgation and publication of the regulations."

(b) In order to complement the approval of a ~~phased~~ partial tribal program, the enforcement of a Federal Indian lands program shall be conducted in accordance with sections 504 and 521 of the Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. 1254; 1271).

(c)(1) Any Indian tribe that ~~may~~ elects to adopt a partial regulatory program shall enter into a cooperative agreement with the Secretary to provide for tribal participation in the regulation of surface coal mining and reclamation operations on Indian lands under a Federal lands program implemented by the Secretary under subsection (a).

(2) In any case where a mining operation extends beyond the exterior boundary of an Indian reservation, an Indian tribe may enter into a cooperative agreement with the State or States in which the operation is also located to provide for tribal participation in the regulation of surface coal mining and reclamation operations. ~~Such agreement must adopt the most stringent environmental protection standards of the State, or States, or Indian tribe that is party to such agreement, regardless of the regulatory entity.~~

"Such agreement must adopt environmental protection standards no less stringent than those required by the Secretary under a Federal Indian Lands Program implemented under subsection (a)."

~~(3) Assumption of regulatory responsibilities under a cooperative agreement may be part of the implementation of a tribal regulatory program.~~

(c)(3) Any cooperative agreement to provide for tribal participation in the regulation of surface coal mining and reclamation operations shall be made pursuant to this Section and shall require the approval of the Secretary. The Secretary shall not approve any cooperative agreement under this subsection until he has held at least one public hearing on the cooperative agreement within the reservation of the tribe party to the agreement and found that the tribe has the legal authority and necessary personnel for the performance of the tribe's duties under such agreement. The Secretary shall not unreasonably withhold approval of such cooperative agreements.

(c)(4) No cooperative agreement shall be construed to delegate to any tribe the authority exercised by or reserved to the Secretary on the Indian reservation in the absence of a tribal regulatory program.

(d) In the absence of any tribal regulatory program, the Federal Government pursuant to section 504 of the Surface Mining Control and Reclamation Act of 1977 shall be the exclusive authority regulating surface coal mining and reclamation operations on the Indian reservation.

SURFACE OWNERS

SEC. 8. (a) Notwithstanding subsection (f) of section 714 of the Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. 1304), the provisions of subsections (c), (e), and (g) of such section shall apply to all coal owned by and all coal held in trust by the United States for an Indian or an Indian tribe under land the surface rights to which are owned by a surface owner as defined in subsection (e) of section 714 where the coal is to be mined by methods other than underground mining techniques.

(b) The provisions of subsections (c), (e), and (g) of section 714 of the Surface Mining Control and Reclamation Act of 1977 shall apply to all persons, including Indians and Indian tribes, that meet the surface owner requirements of paragraphs (1), (2), and (3) of subsection (e) of such section.

PENALTIES

SEC. 9. (a) Notwithstanding the penalty provisions of Public Law 90-284 (25 U.S.C. 1301, et seq.), popularly known as the Indian Civil Rights Act, the civil penalty provisions of any tribal program shall incorporate penalties no less stringent than those set forth in section 518 of the Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. 1268) and shall contain the same or similar procedural requirements thereof.

(b) Tribal courts or any other tribal authority designated in an approved tribal program shall have original jurisdiction to impose civil penalties and sanctions under this Act on all persons who violate this Act (including members of the Indian tribe and individuals who are not members of the Indian tribe) who are engaged in surface coal mining and reclamation operations on Indian lands.

(c) Civil penalties imposed under this Act may be recovered in a civil action brought by the tribal regulatory authority in tribal court.

Tribes prefer deletion

(d) Notwithstanding any other provision of law, the district court of the United States shall have jurisdiction over any appeal of a tribal court judgment rendered under the provisions of this Act. Review of tribal court judgments shall be (*de novo* and) subject to the standards set forth in Section 706 of title 5, U.S.C. For purposes of this subsection, tribal courts are considered agencies within the meaning of Section 706(1) of title 5, U.S.C.

(e)(1) Nothing in this Act shall be construed to eliminate any additional enforcement rights or procedures which are available under tribal or Federal law to a tribal regulatory authority but are not specifically enumerated herein.

(2) Nothing in this Act shall be construed as granting tribal courts criminal jurisdiction over any person who is not an Indian.

ACTIONS BY PRIVATE CITIZENS

SEC. 10. (a) Any person having an interest which is or may be adversely affected may commence a civil action, as provided in section 520 of the Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. 1270) on his own behalf against the Secretary in order to compel compliance with this Act if such person alleges in such action that the tribal regulatory authority has failed to perform any act or duty under this Act which is not discretionary with the tribal regulatory authority and for which the Secretary bears oversight responsibility. The tribal regulatory authority may intervene as a matter of right in such actions. If the action is resolved in favor of the complainant, the Secretary shall take affirmative action to assure compliance by the tribal regulatory authority, including the application of whatever sanctions he may deem appropriate or necessary.

(b) In addition to the action provided in subsection (a), any person having an interest which is or may be adversely affected may commence a civil action on his own behalf to compel compliance with this Act and damages under the procedures provided in section 520 of the Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. 1270).

(c) For purposes of this section, the term "person" includes any Indian tribe.

GRANTS

SEC. 11. The Secretary is authorized to make grants to any Indian tribe for the purpose of assisting such tribe in developing, administering, and enforcing tribal programs under this Act, including the development, maintenance, and administration of tribal court activities that are necessary to carry out the purposes of this Act.

LAND ACQUISITIONS

SEC. 12. Any land acquired—

(1) by the Secretary on behalf of any Indian tribe, or

(2) by any Indian tribe,

under the provisions of this Act shall be held in trust by the Secretary for the benefit of such tribe.

CONFLICT OF INTERESTS

SEC. 13. ~~(a) Except as provided in subsection (b), any financial interest of a person in any underground or surface coal mining operation which exists solely by reason of such person's membership in an Indian tribe shall not be treated as creating a conflict of interest that precludes appointment of such person to, or employment of such person with, any tribal regulatory authority having responsibilities under this Act.~~

(b) ~~No person having a direct financial interest in a coal operation, or employed by an Indian tribe in a coal operation in which the tribe has a direct profit interest may serve in any capacity within a tribal regulatory authority~~.

(a) No person having a direct or indirect financial interest in a coal operation may serve in any capacity within a tribal regulatory authority.

(b) For purposes of this Section, an indirect conflict of interest shall not be construed to exist solely by reason of such person's membership in an Indian tribe or be construed as creating a conflict of interest that precludes appointment to or employment of such person with a tribal regulatory authority.

(c) No Indian tribe which has entered into a joint venture agreement, joint operating agreement, joint production agreement, joint services agreement, joint managerial agreement authorized by the provisions of the Indian Mineral Development Act of 1982 (25 U.S.C.), or any other mineral development agreement in which the tribe has an ownership interest for the purpose of mining coal may be granted authority to regulate surface coal mining and reclamation activities instituted pursuant to such agreements. Nothing in this subsection shall preclude an Indian tribe from assuming regulatory authority to regulate surface coal mining activities in which the tribe is not a party to any such mineral development agreement or in which the tribe has leased coal under the provisions of the Indian Coal Leasing Act of 1938.

ARCHAEOLOGICAL, HISTORICAL, AND CULTURAL RESOURCE INVESTIGATIONS

SEC. 14. (a) ~~All mining permit applications submitted either under a tribal regulatory program or under the Federal Indian lands program shall be subject to an archaeological, historical and cultural resources investigation of the proposed mining area. Such investigation shall be complete and shall be evaluated by the tribe prior to any further consideration of the mining permit application.~~

(b) ~~All information resulting from such investigation shall be the sole and exclusive property of the tribe and shall remain confidential except as provided in subsection (c) of this section.~~

(c) ~~All information resulting from the archaeological, historical and cultural resource investigation on lands subject to such permit application to mine, shall be made part of the permit application only when such permit application is deemed complete by the tribe.~~

Sec. 14 (a) Not later than six months after the date of enactment of this Act, the Secretary shall promulgate and publish in the Federal Register regulations establishing standards and requirements for conducting archaeological, historical and cultural resources surveys and identifications related to proposed surface coal mining operations on Indian reservations in accordance with the applicable provisions of 16 U.S.C. ~~[illegible] et~~ 461-470(LL) ~~[illegible]~~ In developing such regulations, the Secretary shall as required by the provisions of these Acts encourage the protection of the unique and significant archaeological, historical and cultural resources of Indian tribes. Such regulations, which shall be concise and written in plain, understandable language shall not be promulgated and published by the Secretary until he has --

(A) published proposed regulations in the Federal Register and afforded interested persons, Indian tribes and State and local governments a period of not less than thirty days after such publication to submit written comments thereon; and

(B) held at least one public hearing on the proposed regulations. The date, time, and place of any hearing held on the proposed regulations shall be set out in the publication of the proposed regulations. The Secretary shall consider all comments and relevant data presented at such hearing before final promulgation and publication of the regulations.

(b) Any permit application submitted under the provisions of this Act shall include a survey of the probable archaeological, historical, and cultural resources of the permit area and a plan for conducting a detailed archaeological, historical, and cultural identification pursuant to the applicable provisions of 16 U.S.C. 461-470(ll) prior to actual disturbance of each area to be disturbed by mining.

(c) Not withstanding the provisions in any other law, all information resulting from such identification shall be the property of the tribe on whose reservation the identification is made.

(d) Subject to provisions of subsection (c) of this section, archaeological, historical and cultural resource plans which have been approved as of the date of enactment of this Act in accordance with the applicable provisions of 16 U.S.C. 101, et Sec., shall be deemed to have satisfied the requirements of this section.

APPLICATION WITH THE SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977

SEC. 15. For all purposes not inconsistent with this Act, Indian tribes shall be considered as "States" for purposes of meeting the provisions of the Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. 1201-1328) and its provisions are hereby applicable to tribal regulatory programs and Federal Indian lands programs.

REGULATIONS

SEC. 16. (a) The Secretary shall prescribe such regulations as may be necessary to carry out the provisions of this Act.

(b) The regulations prescribed by the Secretary under this Act shall be consistent with and in accordance with the regulations prescribed under the Surface Mining Control and Reclamation Act of 1977 to the extent that the provisions of this Act are similar to the provisions of such Act.

ANNUAL REPORT

SEC. 17. The Secretary shall submit an annual report to the President and to the Congress concerning—

(1) the effectiveness of this Act, and

(2) the activities carried out by the Secretary and the Indian tribes under this Act,

during the preceding twelve-month period. Such report shall include recommendations for legislative or administrative action which the Secretary considers to be necessary or desirable to accomplish the purposes of this Act.

AUTHORIZATION OF APPROPRIATIONS

SEC. 18. There is authorized to be appropriated to the Secretary of the Interior for the purposes of this Act, and from the Tribal Fund established pursuant to section 4 of this Act, such sums as may be necessary to carry out the purposes of this Act. All such funds appropriated shall remain available until expended.

SEVERABILITY

SEC. 19. If any provision of this Act, or the applicability of any provision of this Act to any person or circumstances, is held invalid, the remainder of this Act and the application of such provision to other persons or circumstances shall be not affected thereby.

○